

**PRINCIPLES OF THE
ENGLISH LAW OF
CONTRACT**

PRINCIPLES OF THE ENGLISH LAW OF CONTRACT

AND OF
AGENCY IN ITS RELATION
TO CONTRACT

BY

THE RIGHT HONOURABLE
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The following passages from Sir William Anson's Preface to the Sixth Edition show the scope which he intended this book to have.

‘THE object which I set before me was to trace the principles which govern the contractual obligation from its beginning to its end; to show how a contract is made, what is needed to make it binding, whom it may affect, how it is interpreted, and how it may be discharged. I wished to do this in outline, and in such a way as might best induce the student to refer to cases, and to acquire the habit of going to original authorities instead of taking rules upon trust. So I have cited few cases: not desiring to present to the reader all the modes in which principles have been applied to facts, and perhaps imperceptibly qualified in their application, but rather to illustrate general rules by the most recent or most striking decisions. . . .’

‘I strongly desire to keep it within such limits as is proper to a statement of elementary principles, with illustrations enough to explain the rules laid down, and, as I hope, to induce the student to consult authorities for himself.’

W. R. A.

*All Souls College
January 1891*

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1938	Evidence Act (1 & 2 Geo. VI, c. 28), s. 3	130
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1943	Law Reform (Frustrated Contracts) Act (6 & 7 Geo. VI, c. 40)	448, 452, 532, 552
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SOME ABBREVIATIONS USED IN REFERENCE

REPORTS

A. & E.	Adolphus & Ellis	Q.B.	1834-1840
Aleyn	Aleyn	K.B.	1646-1648
All E.R.	All England Reports	All	1936-date
Amb.	Ambler	Ch.	1737-1783
Atk.	Atkyns	Ch.	1736-1754
B. & Ad.	Barnewall & Adolphus	K.B.	1830-1834
B. & Ald.	Barnewall & Alderson	K.B.	1817-1822
B. & C.	Barnewall & Cresswell	K.B.	1822-1830
B. & P.	Bosanquet & Puller	C.P.	1796-1804
B. & S.	Best & Smith	Q.B.	1861-1869
Beav.	Beavan	Rolls Court	1838-1866
Bing.	Bingham	C.P.	1822-1834
Bing., N.C.	Bingham, New Cases	C.P.	1834-1840
Bulst.	Bulstrode	K.B.	1609-1626
Burr.	Burrow	K.B.	1756-1772
C. & J.	Crompton & Jervis	Ex.	1830-1832
C. & K.	Carrington & Kirwan	Nisi Prius	1843-1853
C. & M.	Crompton & Meeson	Ex.	1832-1834
C. & P.	Carrington & Payne	Nisi Prius	1823-1841
C.B.	Common Bench	C.P.	1845-1856
C.B., N.S.	Common Bench, New Series	C.P.	1856-1865
C.L.R.	Commonwealth Law Reports	Australia	1903-date
C.L.Y.B.	Current Law Year Book	All	1947-date
C., M. & R.	Crompton, Meeson & Roscoe	Ex.	1834-1836
Camp.	Campbell	Nisi Prius	1807-1816
Carth.	Carthew	K.B.	1687-1700
Cl. & Fin.	Clark & Finnelly	H.L.	1831-1846
Co. Rep.	Coke	All	1572-1616
Colles, P.C.	Colles	H.L.	1697-1713
Com. Cas.	Commercial Cases	All	1895-1941
Cowp.	Cowper	K.B.	1774-1778
Cox.	Cox's Equity	Ch.	1783-1796
Cr. & Ph.	Craig & Phillips	Ch.	1840-1841
Cro. Eliz.	Croke, of the reign of Elizabeth	C.P., Q.B.	1582-1603
Cro. Jac.	Croke, of the reign of James	C.P., K.B.	1603-1625
D. & S.	Drewry & Smale	V.-C.	1860-1865
D.L.R.	Dominion Law Reports	Canada	1912-date
De G. & J.	De Gex & Jones	Ch.	1857-1859
De G., F. & J.	De Gex, Fisher & Jones	Ch.	1859-1862
De G., M. & G.	De Gex, Macnaghten & Gordon	Ch.	1851-1857

Doug. K.B.	Douglas	K.B.	1778-1781
Drew.	Drewry	V.-C.	1852-1859
E. & B.	Ellis & Blackburn	Q.B.	1852-1858
E. & E.	Ellis & Ellis	Q.B.	1858-1861
E., B. & E.	Ellis, Blackburn & Ellis	Q.B.	1858
East	East's Term Reports	K.B.	1800-1812
Esp.	Espinasse	Nisi Prius	1793-1807
Ex.	Exchequer Reports	Ex.	1848-1856
F. & F.	Foster & Finlason	Nisi Prius	1793-1807
H. & C.	Hurlstone & Coltman	Ex.	1862-1866
H. & N.	Hurlstone & Norman	Ex.	1856-1862
H. Bl.	Henry Blackstone	C.P.	1788-1796
H.L.C.	House of Lords Cases	H.L.	1847-1866
Hare	Hare	V.-C.	1841-1853
Hob.	Hobart	K.B.	1603-1625
Ir. Rep.	Irish Reports	Ireland	1838-date
Ir. C.L.	Irish Reports, Common Law	Ir.Q.B.	1866-1878
J. & H.	Johnson & Hemming	V.-C.	1859-1862
J. & W.	Jacob & Walker	Ch.	1819-1821
J.P.	Justice of the Peace and Local Government Review	All	1837-date
John.	Johnson	V.-C.	1858-1860
K. & J.	Kay & Johnson	V.-C.	1854-1858
Keen	Keen	Rolls Court	1836-1838
L.J.C.P.	Law Journal, Common Pleas	C.P.	
L.J. Ch.	" " Chancery	Ch.	
L.J. Ex.	" " Exchequer	Ex.	1832-1949
L.J.Q.B.	" " Queen's Bench	Q.B.	
L.T.	Law Times Reports	All	1859-1947
Ld. Raym.	Lord Raymond	K.B., C.P.	1694-1732
Lev.	Levinz	K.B., C.P.	1660-1696
Ll. L.R.	Lloyd's List Law Reports	All	1919-1950
Lloyd's Rep.	Lloyd's List Law Reports	All	1951-date
M. & G.	Manning & Grainger	C.P.	1840-1844
M. & W.	Meeson & Welsby	Ex.	1836-1847
Madd.	Maddock	V.-C.	1815-1821
Mer.	Merivale	Ch.	1815-1817
Mod.	Modern Reports	All	1669-1702
My. & K.	Myline & Keen	Ch.	1832-1835
N.Z.L.R.	New Zealand Law Reports	N.Z.	1883-date
Nev. & M.	Neville & Manning	K.B.	1832-1836
Noy	Noy	K.B.	1559-1649
Peere Wms.	Peere Williams	Ch.	1695-1735
Q.B.	Queen's Bench Reports	Q.B.	1841-1852
Q.L.J.	Queensland Law Journal	Australia	1879-1901
R.P.C.	Reports of Patent Cases	Pat. Cas.	1884-date
Russ.	Russell	Ch.	1823-1829

ABBREVIATIONS

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S.C.	Session Cases	Scotland	1906-date
Salk.	Salkeld	All	1689-1712
Sid.	Siderfin	All	1657-1670
Sim.	Simons	V.-C.	1826-1849
St. Tr.	State Trials	—	1163-1820
Str.	Strange	All	1716-1749
Swan.	Swanston	Ch.	1818-1819
T.L.R.	Times Law Reports	All	1884-1952
Taunt.	Taunton	C.P.	1807-1819
Term Rep.	Term Reports	K.B.	1785-1800
Ventr.	Ventris	All	1668-1691
Ves. Jun.	Vesey Junior	Ch.	1789-1817
Ves. Sen.	Vesey Senior	Ch.	1746-1755
W. Bl.	William Blackstone	K.B.	1746-1779
Y. & C. Ch.	Younge & Collyer (Chancery)	V.-C.	1841-1843
Y. & J.	Younge & Jervis	Ex.	1826-1830
Y.B.	Year Books (with regnal year)		

LAW REPORTS, 1865-date

L.R.C.P.	Common Pleas	}	1865-1875
L.R. Ch. App	Chancery Appeals		
L.R. Eq.	Equity Cases		
L.R. Ex.	Exchequer		
L.R.H.L.	House of Lords, English and Irish Appeals		
L.R.Q.B.	Queen's Bench	}	1875-1880
L.R. Sc. App.	Scottish Appeals		
C.P.D.	Common Pleas Division		
Ex. D.	Exchequer Division		
App. Cas.	Appeal Cases		
Ch. D.	Chancery Division	}	1875-1891
P.D.	Probate Division		
Q.B.D.	Queen's Bench Division		
A.C.	Appeal Cases	}	1891-date
Ch.	Chancery Division		
K.B. or Q.B.	King's (Queen's) Bench Division		
P.	Probate Division		
W.L.R.	Weekly Law Reports		1953-date

PERIODICALS

Aust. L.J.	Australian Law Journal
Camb. L.J.	Cambridge Law Journal
Can. Bar Rev.	Canadian Bar Review

Conv. (N.S.)	Conveyancer and Property Lawyer (New Series)
Harv. L.R.	Harvard Law Review
L.Q.R.	Law Quarterly Review
Mod. L.R.	Modern Law Review
S.A.L.J.	South African Law Journal
Sol. Journ.	Solicitor's Journal

INTRODUCTION

CHAPTER I. THE NATURE AND HISTORY OF CONTRACTUAL OBLIGATIONS

CHAPTER I

THE NATURE AND HISTORY OF CONTRACTUAL OBLIGATIONS

THE principles of the English law of Contract are almost entirely the creation of the English Courts, and the legislature has played a relatively small part in their development. They are also, for the most part, a development of the last two hundred years; for contract law is the child of commerce, and has grown with the growth of England from a mainly agricultural into a mainly commercial and industrial nation. In Blackstone's *Commentaries on the Laws of England*, which were first published in 1756, it is significant of the comparative unimportance of the subject that he devoted 380 pages to the law of real property, and only 28 to contract. Further, he treated contract as one among other methods of acquiring a title to property in things personal, merely distinguishing it from gift or grant, with which he regarded it as 'much connected', by the fact that contract as a rule vested property in action, whereas the former vested it in possession. Thus to Blackstone, the law of Contract was rather a subdivision of the law of Property than an independent branch of law.

In fact it differs from other branches of law in an important respect. It does not lay down a number of rights and duties which the law will enforce; it consists rather of a number of limiting principles, subject to which the parties may create rights and duties for themselves which the law will uphold. The parties to a contract, in a sense, make the law for themselves. So long as they do not infringe some legal prohibition, they can make what rules they like in respect of the subject-matter of their agreement, and the law will give effect to their decisions.

In this chapter, therefore, we shall consider, first, the juridical nature of contractual obligations, and, secondly, their history in English law.

I. THE NATURE OF CONTRACTUAL OBLIGATIONS

We may provisionally define the law of Contract as that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it. We

Contract
in the
common
law

Definition
of a con-
tract

have therefore to analyse this conception, and to ascertain the machinery by which men are constrained to keep faith with one another.

The Promise

Nature of a promise A Promise may be defined as a declaration or assurance made to another person with respect to the future, stating that the maker will do, or refrain from, some specified act, and conferring on that other a right to claim the fulfilment of such declaration or assurance.

It involves, therefore, two parties at least, one making and the other receiving the declaration with respect to the future, whom we call respectively the promisor and promisee. The parties are ascertained or identifiable persons, and any rights and duties which arise out of the promise are thus confined to those persons. A contractual right differs, therefore, from a right of action in tort. It is, as jurists say, a right *in personam*, available only against a particular person or persons, whereas a tortious right is a right *in rem*, which avails against persons generally.

A promise is more than a mere statement of intention, for it imports a willingness on the part of the promisor to be bound to the person to whom it is made. The intention of the parties must be to create an obligation between them—that is to say, to impose a duty on the promisor to fulfil his promise, and to confer a right on the promisee to claim its fulfilment—which is not merely a moral or a social, but a legal obligation. A promise, for example, to go out to dinner would involve the promisor in no legal liability, for it is clear that it is merely a social engagement.

A promise is again more than a mere offer to perform some particular act. It must have been accepted by the promisee. A promise, in fact, connotes an agreement between the parties to it. So until such an agreement has been reached, the promise is normally without any legal effect.

Consensus ad idem

Contract defined in terms of consensus This requirement of agreement has led certain juristic writers, especially those of the nineteenth century, to place great emphasis upon the consensual nature of contractual obligations. The essence of a contract is, it is said, the meeting of the wills of the parties in full and final agreement; there must, in fact, be *consensus ad idem*.

The reasons for this doctrine seem to be twofold.

First, it was a natural concomitant of nineteenth-century *laissez faire* politics that as few restrictions as possible should be placed upon 'freedom of contract'.¹ Industry and commerce called for robust ideas of social and economic theory to support their vigorous policies of expansion and exploitation. When, in 1861, Sir Henry Maine wrote his *Ancient Law*, he postulated that the movement of progressive societies had hitherto been a movement from status to contract. This movement was not only desirable, but inevitable. 'Imperative law', he said,² 'has abandoned the largest part of the field which it once occupied, and has left men to settle rules of conduct for themselves with a liberty never allowed to them till recently.' But Maine was writing at the close of an epoch in which the champions of individualist social philosophy had been attacking legal and social restrictions behind which privileges were entrenched which were almost entirely indefensible; the battle had been won, and freedom of contract was one of the trophies of victory.

because of
'freedom of
contract'

Today the position is seen in a very different light. Freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of a collectivist society it has ceased to have much idealistic attraction. It is now realized that economic equality often does not exist in any real sense, and that individual interests have to be made to subserve those of the community. Hence there has been a fundamental change both in our social outlook and in the policy of the legislature towards contract, and the law today interferes at numerous points with the freedom of the parties to make what contract they like. The relations between employers and employed, for example, have been regulated by statutes designed to ensure that the employee's conditions of work are safe, that he is properly protected against industrial accidents, and that he receives a minimum wage. The public has been protected against economic exploitation by such measures as the Moneylenders Act,³ the Rent Restriction Acts,⁴ the Hire-Purchase Acts,⁵ and other similar enactments. These legislative

which is
no longer
acceptable

¹ See Friedmann, *Law and Social Change in Contemporary Britain*, p. 34.

² (1930 ed.), ch. ix, p. 322.

³ Moneylenders Act, 1927 (17 & 18 Geo. V, c. 21).

⁴ e.g. Rent and Mortgage Restrictions Act, 1939 (2 & 3 Geo. VI, c. 71).

⁵ Hire-Purchase Acts, 1938 (1 & 2 Geo. VI, c. 53) and 1954 (2 & 3 Eliz. II, c. 51).

provisions will override any contrary terms which the parties may make for themselves. Further, the legislature has intervened in the Restrictive Trade Practices Act, 1956,¹ to prevent the domination of the economic life of this country by combinations of manufacturers which might sometimes run counter to the public interest.

This intervention is especially necessary today when most contracts entered into by ordinary people are not the result of individual negotiation. It is not possible for a private person to settle the terms of his agreement with the Railway Executive or with the local Gas Board. The 'standard form' contract is the rule.² He must either accept the terms of this contract *in toto*, or go without. Since, however, it is not feasible to deprive oneself of such necessary services, the individual is compelled to accept on those terms. In view of this fact, it is quite clear that freedom of contract is now largely an illusion.

and because of nature of defences The second reason for the doctrine of *consensus* is more philosophical. It will be seen later in this book that certain defences may be set up in answer to a claim for damages for breach of contract. For example, it may be alleged that the contract was induced by the misrepresentation of the plaintiff, that the defendant was suffering from some incapacity such as lunacy or drunkenness, or that the parties had contracted together under some false and fundamental mistake. The presence of these defences, it is said, clearly indicates the subjective nature of contractual obligations. In addition to the external phenomenon of agreement, it must further be shown that each party consented to be bound, and that this consent was 'true, full and free'.³ If this condition is not satisfied, no real *consensus* exists, and the contract will fail.

The main difficulty about this argument is that it is impracticable to place emphasis solely upon the subjective nature of an agreement, and to insist on true *consensus* in every case. It would be impossible to hold that a secret mental reservation by one or other of the parties, or some tacit misunderstanding, should be permitted to destroy the obligation. And even if resort is had to their 'declared will', that is, to their will as declared and announced to the other party, all difficulties will still not yet be surmounted. For reasons of convenience, the law may hold that a contract has been concluded even though the parties are overtly in disagreement. Where, for example, an offer is

¹ 4 & 5 Eliz. II, c. 68.

² Viz. *infra*, p. 146.

³ Pollock, *Principles of the Law of Contract* (13th ed.), p. 364.

accepted by post, it is settled law that the contract is effective as soon as the letter of acceptance is posted. But a letter revoking an offer has no effect until it has been brought to the notice of the offeree. If, therefore, before a letter of revocation reaches the offeree, the offeree sends off a letter of acceptance, a contract comes into existence even though the parties are manifestly not *ad idem*.¹ Again, the construction to be put upon the terms of a contract is that which they reasonably bear, and not that which one or other of the contracting parties chooses to put upon them.²

Injurious Reliance

A more objective theory, and one which has a considerable following in the United States, is that of 'injurious reliance',³ which places little emphasis upon *consensus* and much more upon legal expectations aroused by the conduct of the parties. The difficulties attendant upon a definition of a contract in terms of agreement have led the supporters of this theory to concentrate their attention on the element of a *promise*, which, it is said, is more suggestive of an objective attitude than agreement.⁴ If one party makes to the other a promise which is reasonably understood by that other to be intended to affect legal relations and the promisee acts upon it to his detriment, the promisor will be contractually bound by the promise even though he did not intend to contract, or to contract in those terms.

Objective
theory of
contract

Now although this is, in many ways, a more satisfactory explanation of the attitude adopted by the common law towards the inception and interpretation of contractual obligations, it cannot be accepted as an entirely adequate description of the nature of a contract. In the first place, the law does not, and cannot, adopt a completely objective attitude, since the Draconian requirements of commercial convenience have to be reconciled with the moral qualifications introduced by the concept of fair dealing. Thus the common law, and even more so equity, have admitted defences based on fraud, mistake, duress, misrepresentation, and contractual incapacity. Secondly, in English law, certain additional factors are required for the validity of a contractual obligation. The contract must either be executed in a certain

¹ *Infra*, p. 59.

² *Infra*, p. 138.

³ Pound, *Introduction to the Philosophy of Law*, p. 369; Denning (1952), 15 Mod. L.R. 1.

⁴ Jackson (1937), 53 L.Q.R. 525; *sed quaere?*

form (i.e. under seal)¹ in which case no injurious reliance need be shown, or there must be present some 'consideration' moving from the promisee. As this consideration is normally a detriment, or injury, to the promisee, it might seem to accord well with the theory of injurious reliance. But this is not the case, for the detriment must normally have been incurred at the request of the promisor,² whether express or implied, and so the idea of agreement is seen once again.

Defeasible Concepts

What is required, then, is some formula which would enable us to reconcile the objective phenomena of parties, offer, acceptance, terms and consideration, with the defences based on the absence of a full and free consent. Yet it seems impossible to include all of these as essential conditions of a contract in the same definition.

But is it necessary to do so? It has been pointed out³ that certain legal concepts may conveniently be termed 'defeasible', that is to say, they are capable of being weakened or defeated in a number of different contingencies, but remain intact if no such contingencies mature. A contract is clearly an example of such a defeasible concept. It is not necessary to include as necessary and sufficient conditions in the definition of a contract those psychological elements which can be abstracted from the various defences allowed by the law to defeat contractual expectations. All that is necessary is to set out the positive conditions which must be fulfilled before rights and liabilities are ascribed to the contracting parties, and then those factors which tend to defeat contractual liability.

In this book, then, we shall first describe the objective requirements of a valid contract—the promise, form or consideration, and the contractual terms, and then the various defences which may be raised.

Ineffective Contracts

The advantages of this approach may, perhaps, be appreciated when it is realized that not all of these vitiating factors are uniform in effect. Some of them may render a contract void or illegal, others voidable, while others still may make the contract unenforceable at the suit of one or other of the parties. These

¹ *Infra*, p. 63.

² *Infra*, p. 78.

³ By Professor H. L. A. Hart in (1949), 49 *Proc. Aristotelian Soc.* 179.

terms (void, illegal, voidable, and unenforceable) therefore denote different degrees of ineffectiveness, and they are in constant use in the law of Contract. They are, however, not infrequently used with insufficient precision,¹ and this is understandable, for they may well have different meanings in different situations.

In the case of a *void* contract, for example, it might be thought that such a contract was simply one which the law held to be no contract at all, a nullity from the beginning. The parties would be in the same position as they would have been had the contract never been made. No property would pass under such a contract; so, for example, a third party who purchased goods which had been the subject of a void contract would acquire no title to the goods and have to deliver them up to the true owner.² Conversely, money paid in pursuance of a void contract could be recovered from the person to whom it had been paid.³

This indeed is the meaning of 'void' where a contract is said to be void for mistake.² But in other cases the contract may not be so completely without legal effect. A contract made with an infant may be 'void' under the provisions of the Infants' Relief Act, 1874, but property will pass under it,⁴ and it may even be that one party, the infant, can sue on it.⁵ On the other hand, in the case of a contract rendered 'null and void' by the Gaming Act, 1845,⁶ or in the case of an *ultra vires* contract made by a corporate body,⁷ not only do no rights of action arise out of the contract, but any money or other property transferred cannot be recovered.

Again, the effects of *illegality* may vary considerably according to the degree of moral turpitude involved, the culpability of the parties, and whether or not the contract itself is rendered illegal.⁸ The invalidity is imposed *ab extra* by the law, and it is not at the discretion of the contracting parties.

A *voidable* contract, however, is a contract which one of the parties may rescind or affirm at his option. If he chooses to affirm the contract, or if he fails to exercise his right to rescind within a reasonable time so that the position of the parties has,

¹ See Turpin (1955), 72 S.A.L.J. 58; Honoré (1958), 75 S.A.L.J. 32.

² *Cundy v. Lindsay* (1878), 3 App. Cas. 459; *infra*, p. 260.

³ *Couturier v. Hastie* (1856), 5 H.L. Cas. 673; *infra*, p. 245.

⁴ *Stocks v. Wilson*, [1913] 2 K.B. 235; *infra*, p. 174.

⁵ *Infra*, p. 175; although it is submitted that this is not, in fact, the case.

⁶ 8 & 9 Vict., c. 109; *infra*, p. 283.

Sinclair v. Brougham, [1914] A.C. 398.

⁸ *Infra*, p. 312.

in the meantime, become altered, he may find himself bound by it; otherwise he is entitled to repudiate his liability. Nevertheless, the contract is not a nullity from the beginning. Until it is rescinded, it is valid and binding. A third party, therefore, who purchases goods which have been the subject of a voidable contract acquires a good title to the goods and cannot be compelled to surrender them to their former owner.¹

Unenforce-
able
contracts An *unenforceable* contract is one which is good in substance, though, by reason of some technical defect, one or both of the parties cannot sue on it. The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of proof owing to want of written form,² or failure to fix a revenue stamp. Writing in the first case, and a stamp in the last, may satisfy the requirements of the law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract is unimpeachable, only it cannot be directly enforced in Court. The same considerations apply also to the case of a debt barred by lapse of time under the Limitation Act, 1939.³

II. THE HISTORY OF CONTRACTUAL OBLIGATIONS IN ENGLISH LAW⁴

Necessity
for some
historical
introduc-
tion Our modern law of Contract contains much which can properly be understood only in the light of its history. Without some acquaintance with this history, the Law Reports, especially those earlier in date than the procedural simplifications of the nineteenth century, will hardly be intelligible to the student. Hence, even in a book which aims only at stating the principles of the modern law, it is desirable to give some account of how that law came to take the form which has just been indicated in outline. We shall see that it has not been by any process of analysis and elucidation of the essential nature of a contract that the law has been moulded. Indeed, the very

¹ *Babcock v. Lawson* (1879), 4 Q.B.D. 394; (1880), 5 Q.B.D. 284.

² *Infra*, p. 71.

³ 2 & 3 Geo. VI, c. 21; *infra*, ch. xvii.

⁴ See Ames, *Lectures on Legal History*, viii, ix, xii-xv; Fifoot, *History and Sources of the Common Law (Tort and Contract)*, part ii; Holdsworth, *History of English Law*, iii. 142; viii. 1; Maitland, *The Forms of Action at Common Law*, pp. 63, 68; Plucknett, *Concise History of the Common Law*, part iv; Potter, *Historical Introduction to English Law* (3rd ed.), p. 137; Kiralfy, *The Action on the Case*, p. 137.

idea of enforcing promises or agreements as such, which seems most natural to us, is not an early one in the history of any legal system. We have therefore to go back to a time before any such purpose was consciously present to the minds of English lawyers, and we shall find the key to the story by examining the conditions which the Courts have attached at different stages to the actions which they were willing to admit for the enforcement of the kind of rights which we now regard as contractual.

The story can here be given only in the barest outline, and it should be understood that there are some points in it which are still obscure or controversial.

The Medieval Actions

In the period which immediately followed the Norman Conquest, the royal judges were more concerned with the dual task of keeping the peace and working out the detailed system of land tenure to take much account of private agreements. Nevertheless, by the end of the thirteenth century two forms of action for enforcing rights which included some of those which we should now call contractual had taken fairly definite shape. These were the action of Debt, and the action of Covenant.

(a) *Debt*

It is difficult to describe the action of Debt without reading back into medieval times legal ideas which would not have occurred to lawyers of those days. But if we are to fit it into our modern categories, we shall have to say that, at first, it had more the character of a recuperatory than of a contractual remedy. In fact, originally Debt was but a part of the composite writ of Debt-Detinue, in which the plaintiff alleged that the defendant was 'unjustly detaining' something which was of value to him and to which he was entitled. By the beginning of the fourteenth century it came to be recognized that, in general, Detinue was the proper action for the recovery of specific chattels, and Debt for the recovery of money.

So in Debt the gist of the action was that the defendant was detaining a sum of money which was really the plaintiff's money. The action was used to enforce a variety of claims—for the repayment of a loan, for the price of goods sold, and for the rent reserved in a lease. Or there might have been no 'contract' and the sum might have become owing in some other way—

for example, as customary dues, or by the judgment of a Court. These claims were grouped by later medieval lawyers into three classes: Debt on the Record (for the payment of a sum of money ordered to be paid by a Court and entered upon its record), Debt on an Obligation (where the plaintiff produced a sealed instrument), and Debt on a Contract. Thus in 1410 it was said,¹ 'Each writ of Debt is general and in one form, but the count is special and makes mention of the contract, the obligation, or the record as the case requires.'

The description 'Debt on a Contract' is, however, rather misleading from a modern standpoint, for a contract would result in a 'debt' being owed to the plaintiff only after he had performed his own part under it. For instance, if the plaintiff had agreed to sell goods, there would be no 'debt' owing to him until he had delivered them.² Or to put the same point from the side of the defendant, he would only be liable to an action of Debt if he had received some benefit or performance, a *Quid pro Quo*, in return for his promise to pay the money. Mutual promises were thus insufficient to sustain an action of Debt unless the plaintiff had himself performed his side of the bargain. It is possible that the Courts might, in time, have modified the conditions of this action and developed out of it a remedy for the enforcement of contracts which were completely executory, but, as we shall see, they invented another, and more convenient, remedy to meet that case.

One reason why Debt did not develop in this way was probably because there were certain inconvenient incidents attaching to it which made it unpopular. One of these was that, and its disadvantages in Debt, the defendant might normally 'wage his law',³ and the action would then be determined, not upon its merits, but by an archaic process known as 'compurgation', in which the defendant came into Court and declared upon oath that he did not owe the debt, and twelve respectable neighbours, his 'compurgators' or 'oath helpers' declared, also upon oath, that they believed that his oath was good. A second was that Debt could only be brought to recover a certain sum of money;⁴ and

¹ Y.B. 11 Hen. IV, f. 73, pl. 11.

² By the middle of the fifteenth century, however, the Courts had allowed an exception in the case of an executory contract for the sale of goods. The 'property' in the goods was deemed to pass upon sale, even though no delivery had been made; and this was of sufficient benefit to the purchaser to enable him to be sued by the vendor for the price.

³ Unless the plaintiff produced a sealed instrument.

⁴ He could, however, get damages for detention.

the plaintiff had to recover the precise sum claimed, or fail completely. Finally, the recuperatory nature of the action, and the requirement of a *Quid pro Quo*, stifled its development as a remedy based on agreement, so that it could be very little adapted to meet changing commercial conditions.

(b) *Covenant*

The writ of Covenant had emerged by the beginning of the thirteenth century, and by the reign of Henry III¹ it was a frequently used form of action. In its early years it was employed for the most part, if not exclusively, to protect the interest of a lessee for a term of years.² In time, however, it became more catholic of application, and was extended to cover cases of movables, and also consensual agreements of various kinds. But by the middle of the fourteenth century it was clearly established that Covenant required the production of a sealed instrument. The agreement was enforced not because the parties had exchanged mutual promises, but because it had been made in a particular form to which the law attached a peculiar force.

This requirement of a seal confined the action within formal limits. Moreover, if the plaintiff's claim was for a fixed and certain sum of money, the proper action was that of Debt. Covenant could therefore scarcely be expected to produce a general contractual remedy.

There was yet a third action of a 'contractual' nature. This was the action of Account which could be used against those whose duty it was to account for moneys received by them on behalf of another. Its importance, however, lies mainly in the field of Quasi-Contract, and a description of the action will be given later in this book.³

Assumpsit

The remedy which was eventually found for the enforcement of *informal* promises is a curious instance of the shifts and turns by which practical convenience evades technical rules. Such a remedy was developed out of two actions, the action of Trespass and the action of Deceit, and at first sight it requires more than a little ingenuity to see any logical connexion between

¹ A.D. 1216-72.

² Maitland, *Collected Papers*, ii, 130. Cf. Fifoot, *History and Sources of the Common Law (Tort and Contract)*, p. 255.

³ *Infra*, ch. xxi.

these actions and contractual agreements. But briefly the process was as follows.

Trespass lay for a direct physical injury to the person or to property, but by some process the details of which are contentiously obscure, there had developed out of it a modified form of action which would lie for injuries which were not direct or physical, and this came to be known as Trespass on the Case, or simply as Case.¹ Case is the parent of many of our modern torts as, for instance, nuisance and negligence, but with that side of its prolific development we are not here concerned. Deceit, too, was at first a very narrow and technical form of action, but out of it seems to have developed an action of Deceit on the Case which had a wider compass. The boundaries between these two types of the action on the Case are difficult to trace, but both appear to have been instrumental in the future development of Case in relation to the enforcement of mutual promises.

Now if we are to apply our modern categories to Case, it is evident that we should classify it as an action in tort, and not in contract. It lay originally for damage caused by one man to another by the commission of an unlawful act, a *misfeasance*, but one not amounting to an actual trespass. But one common occasion of one man injuring another by a misfeasance is where he has promised to do something for that other, and has fulfilled his promise so negligently or otherwise improperly that the other has been damnified by his conduct. So, for example, where a ferryman undertook to carry a mare in his boat across a river, but so overloaded the boat that it sank and the mare was drowned,² and where a man promised to cure a horse and yet did it so negligently that the horse died,³ an action was given to the owner in respect of the damage suffered.

At this stage in the story we begin to see a special form of Case breaking off from the parent stock, applicable to the case where damage has been caused by the misperformance of that which a man has 'assumed' or promised to do. This is the action of Assumpsit, which was destined in course of time to supplant the older actions of Debt and Covenant, and to mould

¹ For a different view of the origin of Case, see Milsom, [1954] Camb. L.J. 105.

² *The Humber Ferryman's Case* (1348), Lib. Ass. 22 Edw. III, pl. 41; a disputed case.

³ *Waldon v. Marshall* (1370), Y.B. Mich. 43 Edw. III, f. 33, pl. 38. See Fifoot, *History and Sources of the Common Law (Tort and Contract)*, p. 81.

the conditions on which mere informal promises were to become actionable in our law. But at this stage the action is still delictual: the promise which the defendant has given has provided the occasion for the wrongful act by which he has injured the plaintiff, but it is for the harmful consequences of that act, and not for the broken promise as such, that the action is allowed. There still had to be a positive act; and a mere *nonfeasance*, or failure to carry out a promise, would not suffice. In such a case the judges held that the action, if any, would have to be in Covenant, and the plaintiff would have to produce a sealed instrument.

It was, perhaps, this limitation which led litigants to explore the possibility of Deceit as an alternative remedy. In *Doige's Deceit Case* in 1442,¹ an action of Deceit was brought against Doige in the King's Bench. The complaint was that the plaintiff had bought from Doige a plot of land for £100, that he had paid this sum to Doige, and that Doige had promised to enfeoff him within fourteen days. In fact, Doige had enfeoffed another, and so deceived him. It was contended for Doige that the proper cause of action was in Covenant, but the Court of Exchequer Chamber gave a verdict in favour of the plaintiff.² The case was clearly one of nonfeasance, and it is thus probable that both Deceit and Trespass contributed to the evolution of that branch of case known as Assumpsit. Nevertheless, as late as 1503 a law reporter could note:³

where a carpenter makes a bargain to make me a house and does nothing, no action on the case lies, for it sounds in covenant. But if he makes the house improperly, the action on the case well lies.

By this time, however, the obvious inconvenience of there being no remedy for the breach of an executory contract, unless it had been made under seal, was beginning to influence the Courts, and there was besides a special reason why the common law Courts could not rest content with the law as it then was. The Chancellor was showing signs of being willing to enlarge a jurisdiction which he already exercised over contracts, and the Courts began to fear that he might annex a subject which they regarded as their own. So we find that, at the beginning of the sixteenth century,⁴ they began to allow Assumpsit to be brought

¹ Y.B. Trin. 20 Hen. VI, f. 34, p. 4.

² Dr. Kiralfy has found a verdict for the plaintiff in K.B. Roll, Trin. 18 Hen. VI, m. 111.

³ Keilway, 50 n.

⁴ *Anon.* (1505), Y.B. Mich. 20 Hen. VII, f. 8, pl. 18; *Nota* (1506), Y.B. Mich. 21 Hen. VII, f. 41, pl. 66.

for the nonfeasance of a mere promise. At first, it seems that Assumpsit was only allowed in these cases of nonfeasance where the plaintiff had paid money under the agreement, but before long it was enough if he had suffered some detriment under it other than payment of money. The way was now clear for the formulation of a general contractual remedy based on agreement and with no requirement of form.

Indebitatus Assumpsit

Debt and Assumpsit The next development came about the middle of the sixteenth century, when the Court of King's Bench began to allow Assumpsit to be brought in cases where, in fact, Debt was the proper remedy.¹ This step was bitterly resented by the Court of Common Pleas which had a virtual monopoly of the older actions. In Common Pleas, Assumpsit could only be brought for the recovery of a debt where there had been, subsequent to the incurring of the debt, an express and subsequent promise to pay. But King's Bench seems to have disregarded this limitation. As a result, owing to the superior efficacy of the action of Assumpsit, business (and with it, revenue) began to flow out of Common Pleas into King's Bench, to the satisfaction of the latter and the chagrin of the former. For a time, an unseemly war raged between the two Courts—a war which eventually culminated in a victory for King's Bench.

Slade's Case The case which brought about this victory was *Slade's Case* in 1602,² which, so Coke tells us,³ was twice argued before all the justices of England and the Barons of Exchequer assembled in the old full Court of Exchequer Chamber:⁴

Slade complained that, at the special instance and request of the defendant, Morley, he had bargained and sold to Morley a crop of wheat and corn; that the defendant had assumed and promised to pay him the sum of £16; that the defendant had not paid the said sum, whereby he suffered damage. The jury found, in a special verdict, that there was no other promise or assumption except the actual bargain itself.

¹ See Simpson (1958), 74 L.Q.R. 381.

² (1602), 4 Co. Rep. 91 a.

³ As Attorney-General, he was counsel for the plaintiff.

⁴ This seems either to have been an astute manoeuvre or, what is more likely, a genuine attempt to place the law on a more stable footing. Normally, the Court of Error from King's Bench was that of the Exchequer Chamber, composed of the justices of Common Pleas and Barons of the Exchequer. The informal Court would also include those of King's Bench.

It was argued on behalf of the defendant that the proper form of action was Debt and not the action on the case for Assumpsit, and that to hold otherwise would be to deprive the defendant of the opportunity of Waging his Law. The Court, however, held that, although the action of Debt lay upon the contract, yet the plaintiff might have an action on the case or an action of Debt at his option. And it was further resolved that 'every contract executory imports in itself an Assumpsit, for when one agrees to pay money or to deliver any thing, thereby he assumes or promises to pay or deliver it.' It may be said that this is the most important case in the whole history of contractual obligations in English law, for the action of Assumpsit was now able to emerge as a general contractual action, freed from the inhibiting forms and limitations of the medieval writs.

This generalization is the distinctive mark of the English law of Contract. In Roman law, for example, the jurists thought in terms of particular obligations—of sale, loan, hire, and deposit, and made but trifling generalizations from these. In the common law, however, particular contracts were, for the most part, discarded, and the common lawyers thought more in terms of a single type of obligation with a variable content than of the pigeon-hole actions of a formulary system. This process was aided and accentuated by the fact that, not long after *Slade's Case*, the Courts began to allow Assumpsit to be brought when services had been rendered or goods supplied in circumstances which made it clear that they were to be paid for, even though the amount of the payment had not been expressly fixed.¹ The plaintiff was allowed an action for *quantum meruit*, for the amount which his services deserved, or for *quantum valebant*, for the amount which the goods were worth, or, as we should say today, he was allowed to claim a reasonable remuneration or a reasonable price. Later still the Courts went even further and were ready to imply a contract not only from the conduct of the parties, but also where there was no agreement at all. But this development is dealt with in the chapter on Quasi-Contract later in this book.²

In 1852 it became no longer necessary to mention in the writ by which an action was begun the particular form in which it was being brought, and in 1875 the Judicature Act abolished the forms of action altogether. Thus English law was

¹ *Hall v. Walland* (1621), Cro. Jac. 618.

² *Infra*, ch. xxi.

left with a generalized law of contract—a situation which contrasts favourably with the lack of generality in the companion subject of torts.

Consideration

Origin of
considera-
tion We still have to ask how it was that Consideration became the test of the actionability of informal promises in English law, and this question is a difficult one to answer. At an early stage in the history of the action of Assumpsit, there must have been some speculation as to whether all promises were binding, even if gratuitous, but the exact origin of consideration is by no means clear.

Some have found the answer in the *Quid pro Quo* of Debt.¹ This seems unlikely, since the essence of a *Quid pro Quo* was the benefit conferred upon the debtor, which cast upon him the duty to pay, whereas the essence of consideration is normally the detriment incurred by the promisee. Others have found it in the 'bargain' nature of the English law of Contract,² but this is to neglect the formative influence of consideration in this respect.

The most probable explanation is that it is the result of the original tortious nature of the action of Assumpsit, the detriment being the damage resulting from the breach of the obligation.³ Of course, it is true to say that there is no logical connexion between detriment in tort and detriment in contract, as the latter is the thing which 'buys' the counter-promise or undertaking before any breach has occurred. But it may be that the clue lies in that delicate stage in the history of Assumpsit when it was sought to bring the action for a mere nonfeasance. If *A* promised *B* to build him a house and did nothing, wherein lay *A*'s hurt? Nowhere, unless he had already paid across the money for the building.⁴ So a plaintiff would have to show either resultant damage in an action for misfeasance, or the payment of a consideration in an action for nonfeasance. Cause and effect are not distinguished. The idea once planted began to grow, and it was encouraged by the introduction into the common law of the concept of *causa*⁵ or 'good consideration'

¹ Holmes, *The Common Law*, ch. vii.

² Fifoot, *History and Sources of the Common Law (Tort and Contract)*, p. 398.

³ Holdsworth, *H.E.L.* iii. 3.

⁴ *Anon.* (1505), Y.B. Mich. 20 Hen. VII, f. 8, pl. 18, *per* Frowicke C.J. dissenting, 'If money paid, case lies.'

⁵ Salmond, *Essays in Jurisprudence and Legal History*, p. 187.

from the Court of Chancery, where it had been known since the very beginning of the sixteenth century. This must have become familiar to the common law judges when the passing of the Statute of Uses in 1535 brought much former 'equitable' business into their Courts.

(Whatever may have been its origin, the sufficiency of mutual promises came quickly to be recognized, each party's promise being a detriment as it was a 'charge' upon him. Thus in *Wichals v. Johns* in 1599,¹ Popham C.J. was able to say: 'there is mutual promise, the one to the other, so that, if the plaintiff does not [perform his promise], the defendant may have his action against him; and a promise against a promise is a good consideration.' In this way the stamp of an agreement was placed upon the English law, and the doctrine of consideration.

¹ (1599), Cro. Eliz. 703 (Fifoot, op. cit., p. 400).

PART I
FORMATION OF CONTRACT

CHAPTER II. THE PROMISE

CHAPTER III. FORM AND CONSIDERATION

CHAPTER IV. THE TERMS OF THE CONTRACT

CHAPTER II

THE PROMISE

A CONTRACT consists in an actionable promise or promises. Every such promise involves two parties, a promisor and a promisee, and an expression of a common intention and of expectation as to the act or forbearance promised. When a contract consists, as it often does, of mutual promises, each party is of course both a promisor and a promisee, and this fact should not be lost sight of in any discussion of this subject. It tends to be somewhat obscured in statements of the law of contract because the legal interest of a contract usually only begins when some doubt or dispute has arisen as to the promise of one of the parties, and in discussing the question which has arisen he is naturally referred to as the promisor. But he may well be also the promisee.

I. ESTABLISHING THE PROMISE

On the threshold of our subject we must bring the parties together and must ask, How is this expectation created which the law will not allow to be disappointed? Has a definite promise been made, and, if so, what are its terms? For 'unless all the material terms of the contract are agreed, there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.'¹

Certainty of Terms

We may start, therefore, with the principle that the law requires the parties to make their own contract; it will not make a contract for them out of terms which are indefinite or illusory.

A number of cases can be found to illustrate this point, for experience teaches us that precision in the use of language is a gift enjoyed by far too few:

A bought a horse from B and promised that 'if the horse was lucky to him he would give five pounds more or the buying of another horse': it

¹ *Foley v. Classique Coaches, Ltd.*, [1934] 2 K.B. 1, per Maugham L.J. at p. 13.

was held that such a promise was too loose and vague to be considered in a court of law.¹

C covenanted with *D* to retire wholly from the practice of a trade 'so far as the law allows': it was held that the parties must fix the limit of their covenant and not leave their agreement to be framed for them by the Court.²

E made a contract with *F* and promised that 'if satisfied with you as a customer' he 'would favourably consider' an application for the renewal of the contract: it was held that there was nothing in these words which would create a legal obligation.³

G engaged *H*, an actress, to act in a play at 'a West End salary to be mutually arranged between us': it was held that there is no contract when, as in this case, a promisor has a discretion whether he will or will not carry out what purports to be his promise.⁴

Similarly when a motor-van was to be bought on the understanding that part of the price should be paid on 'hire-purchase' terms,⁵ and when woollen goods were to be bought 'subject to war clause',⁶ there was no completed contract in either case, for 'hire-purchase' terms and 'war clauses' may take many forms, and it is for the parties and not for the Court to define them.

Id certum est quod certum reddi potest On the other hand, a transaction which at first sight seems to leave some essential term of the bargain undetermined may, by implication, if not expressly, provide some method of determination other than a future agreement between the parties. In that event, since it is a maxim of the law that *id certum est quod certum reddi potest*, there will be a good contract.⁷ In every case the function of the Court is to put a fair construction on what the parties have said and done, though the task is often a difficult one when an instrument has attempted to record some complicated business bargain. The parties making such a bargain naturally assume that it will be carried out and therefore do not always express it with the exactness of terminology that lawyers, whose profession leads them to contemplate the possibility of future disputes, might have employed.

Some of the considerations which the Courts take into

¹ *Guthing v. Lynn* (1831), 2 B. & Ad. 232.

² *Davies v. Davies* (1887), 36 Ch. D. 359.

³ *Montreal Gas Co. v. Vasey*, [1900] A.C. 595.

⁴ *Loftus v. Roberts* (1902), 18 T.L.R. 532.

⁵ *Scammell v. Ouston*, [1941] A.C. 251.

⁶ *Bishop & Baxter v. Anglo-Eastern Trading Co.*, [1944] K.B. 12.

⁷ *Hillas & Co. v. Arcos, Ltd.* (1932), 147 L.T. 503.

account in such cases have been well expressed by Lord Wright in *Hillas & Co. v. Arcos, Ltd.*:¹

Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to *make a contract* for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implications I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain if the fair meaning of the parties can be extracted.

In that case:

The plaintiffs entered into an agreement with the defendants for the sale to them in 1930 of a quantity of Russian softwood timber. The contract contained a clause giving to the plaintiffs an option to purchase further timber in 1931, but the option gave no particulars as to the kind or size or quality of the timber, nor of the manner of shipment. When the plaintiffs sought to exercise the option, the defendants pleaded that the clause was too indeterminate and uncertain to indicate an unequivocal intention to be bound, and that it was merely an agreement to negotiate a future agreement.

The House of Lords held that, in the light of the previous dealings between the parties, there was a sufficient intention to be bound; the terms left uncertain in the option could be ascertained by reference to those contained in the original contract and from the circumstances surrounding the transaction.

The terms of a contract may thus be ascertained from previous transactions between the same parties, or from the custom

¹ (1932), 147 L.T. 503, at p. 514.

of a particular trade or profession. If the contract is one for the sale of goods, it will not necessarily fail because the parties have omitted to agree upon a price, for section 8 of the Sale of Goods Act, 1893, provides:¹

(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a *reasonable price*.

The law is generally anxious to uphold the contract wherever possible lest it should incur the reproach of being the destroyer of bargains.² Accordingly, if the contract contains an indefinite, but subsidiary provision, the Courts have felt at liberty to strike it out as being without significance, and to give effect to the rest of the contract without the meaningless term. In *Nicolene, Ltd. v. Simmonds*, for example:³

The plaintiffs ordered from the defendant a quantity of steel bars of specified sizes and at a fixed price. The defendant accepted the order by a letter in which he stated 'I assume that we are in agreement that the usual conditions of acceptance apply.' When sued for breach of contract, he pleaded that no definite contract had been concluded between him and the plaintiffs.

The Court of Appeal held that, there being no 'usual conditions of acceptance', the phrase was meaningless and so could be struck out without prejudice to the rest of the agreement, which was complete and enforceable. Denning L.J. pointed out that this was not a case of a clause yet to be agreed, when the matter would still be in negotiation;⁴ it was a case of a clause which was incapable of any precise meaning and which could clearly be severed from the rest of the contract. The plaintiffs were entitled to succeed.

Offer and Acceptance

When there is doubt whether an agreement has actually been reached, or, if it has, what are its precise terms, it is often useful to inquire whether in the negotiations which have taken

Contract
may
originate
in offer and
acceptance

¹ 56 & 57 Vict., c. 71. Also see s. 29 of the same Act for provisions as to the time and place of delivery.

² *Hillas & Co. v. Arcos, Ltd.* (1932), 147 L.T. 503, *per* Lord Tomlin at p. 512.

³ [1953] 1 Q.B. 543. Cf. *British Electrical and Associated Industries (Cardiff), Ltd. v. Patley Pressings, Ltd.*, [1953] 1 W.L.R. 280, and *Heisler v. Anglo-Dal, Ltd.*, [1954] 1 W.L.R. 1273.

⁴ *Viz. infra*, p. 110.

place between the parties we can find a definite offer on one side, and an equally definite acceptance of that offer on the other. For most contracts are reducible by analysis to the acceptance of an offer. If, for instance, *A* and *B* have agreed that *A* shall purchase from *B* a property for £50,000, we can trace the process to a moment at which *B* must have said to *A*, in effect, 'Will you give me £50,000 for my property?', and *A* has replied, 'I will'; or at which *A* has said to *B*, 'Will you let me have the property for £50,000?' and *B* has said, 'I will'. There are cases to which this analysis does not readily apply—the signature of a prepared agreement, the acceptance by two parties of terms suggested by a third. Such instances are sometimes reducible to question and answer in an elliptical form. If *A* and *B* are discussing the terms of a bargain, and eventually accept a suggestion made by *C*, there is probably a moment when *A*, or *B*, says or intimates to the other, 'I will accept if you will.' It would be unwise to push the analysis too far: but as a working method which, more often than not, enables us, in a doubtful case, to ascertain whether an agreement has in truth been reached between the parties, the analysis may usefully be retained.

The process of 'offer and acceptance' may take place in any one of three ways:

How offer
and accept-
ance must
be made

1. In a simple promise, intended to be binding by the promisor:¹ this, in English law, applies only in the case of contracts under seal,² for no promise, not under seal, is binding unless the promisee has furnished something (called Consideration)³ in return for the promise.

Illustration: A wealthy man, by an agreement made under seal, promises to pay a hospital £10,000 in order to build a new ward. The promise is binding on him even though it is, in fact, merely a gift.

2. In the offer of a promise for an act:⁴ as when a man offers a reward for the doing of a certain thing, which being done he is bound to make good his promise to the doer.

Illustration: A man who has lost his dog offers by advertisement a reward of £5 to anyone who will bring the dog safely home; he offers a promise in return for an act; and when *X*, knowing of the reward, brings the dog safely home, the act is done and the promise becomes binding.

¹ *Xenos v. Wickham* (1867), L.R. 2 H.L. 296, at p. 323.

² *Viz. infra*, p. 63.

³ *Viz. infra*, p. 77.

⁴ *Viz. infra*, p. 44.

3. In the offer of a promise for a promise:¹ in which case when the offer is accepted by the giving of the promise, the contract consists of an outstanding obligation on both sides.

Illustration: *A* offers *B* to pay him a certain sum of money if *B* will promise to dig his garden for him within a certain time. When *B* makes the promise asked for, he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow him to do it and to pay for it.

Difference between contracts 'unilateral' and 'bilateral' It will be observed that case (2) differs from (3) in an important respect. In (2) the contract does not come into existence until one party to it has done all that he is required to do. It is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In consequence, such a contract is sometimes termed 'unilateral'² as only one person is bound. In (3), however, each party is obliged to some act or forbearance which, at the time of entering into the contract, is future; there is an outstanding duty on either side. This is frequently known as a 'bilateral' contract, and each party is both a promisor and a promisee.

Inferences from Conduct

Inferred agreement The description which has been given of the possible forms of offer and acceptance shows that conduct may take the place of written or spoken words in the case of acceptance. The same is true of an offer. The intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.

In day-to-day contracts such inferences are frequent. For example, a person who boards a motor-bus or tram, or who hires a taxi-cab, thereby undertakes to pay the fare to his destination even though he makes no express promise to do so. And one who puts a coin in an automatic machine thereby enters into a contract with the supplier although no words have been exchanged on either side. The test of such a contract is an objective and not a subjective one; that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if *A* allows *B* to work for him under such circumstances that no reasonable man would suppose that *B* meant to do the work for nothing, *A* will be

¹ *Viz. infra*, p. 45.

² *The American Restatement of Contracts*, § 12. *Great Northern Railway v. Witham* (1873), L.R. 9 C.P. 16.

liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.¹

To illustrate the operation of an inferred agreement, let us consider a few decided cases. In *Steven v. Bromley*:²

Illustrations

The charterers of a ship agreed to load a cargo of steel billets at a certain rate of freight. Nearly half the cargo tendered by them, and accepted for shipment by the shipowner, consisted of general merchandise, for which the current rate of freight was substantially higher than the rate for steel billets agreed on under the charter.

It was held that the proper inference from these facts was that the parties had made a fresh contract; the charterers by their conduct had requested the shipowner to carry a substituted cargo on the terms that they would pay the current rate of freight for cargo of that description, and the shipowner had accepted their offer and was entitled to the higher rate for that part of the cargo.

Sometimes the inference from conduct is not so clear, but the conduct of the parties may be inexplicable on any other ground than that they intended to contract. In the case of *Crears v. Hunter*:³

B's father was indebted to *A*, and *B* gave to *A* a promissory note for the amount due with interest payable half-yearly at five per cent. *A* thereupon forbore to sue the father for the debt. The father died, and *A* sued *B* on the note.

Was there evidence to connect the making of the note with the forbearance to sue? In other words, did *B* offer the note in return for a forbearance to sue?

It was argued [said Lord Esher M.R.⁴] that the request to forbear must be express. But it seems to me that whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from circumstances, it is the same as if there was an express request.

The Court of Appeal held that the jury were entitled to infer a contract in which *B* made himself responsible for the debt if *A* would give time to the debtor to pay.

¹ *Paynter v. Williams* (1833), 1 C. & M. 810; *City of Moncton v. Stephen* (1956), 5 D.L.R. (2d) 722.

² [1919] 2 K.B. 722. See also *Clarke v. Earl of Dunraven (The 'Satanita')*, [1897] A.C. 59; *Dugdale v. Lloving* (1875), L.R. 10 C.P. 196.

³ (1887), 19 Q.B.D. 341.

⁴ At p. 345.

A somewhat extreme example of the objective nature of the inference to be made is provided by *Upton-on-Severn R.D.C. v. Powell*.¹

The defendant's farm was on fire. He telephoned the Upton police and asked them to send for the fire-brigade. The police sent for the Upton fire-brigade, which arrived and extinguished the fire. It appeared, however, that although the defendant's farm was in the Upton police area, it was in the Pershore fire-brigade area. So the Upton brigade, having been summoned to perform services outside its own area, sued to recover payment for the services performed.

The Court of Appeal held that a contract should be inferred between the defendant and the Upton brigade. Even though the defendant undoubtedly wished to summon the fire-brigade in whose area he was, he had, in fact, instigated the summoning of the Upton brigade who had reasonably accepted the call. He was therefore bound to remunerate them for their services. This decision has been criticized, and with some justification, but it nevertheless illustrates the lengths to which the Courts may be prepared to go in their objective treatment of the phenomenon of agreement.

Intention to Create Legal Relations

Offer must
be intended
to affect
legal
relations

An offer, in order that it may be made binding by acceptance, must be one which can reasonably be regarded as having been made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though acted upon by the party to whom it was made. In an old case, *Weeks v. Tybald*,² the defendant said, in conversation with the plaintiff, that he would give £100 to him who married his daughter with his consent. The plaintiff married the defendant's daughter with his consent, and afterwards brought an action on the alleged promise. It was held that it is not reason that the defendant 'should be bound by general words spoken to excite suitors'.

Social en-
gagements

Sometimes it is clear from the nature of the agreement that there was no intention to enter into a binding contract. On this footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. We cannot always say that the reason why such

¹ [1942] 1 All E.R. 220. See also the case of *Bardell v. Pickwick* reported in Dickens's *Pickwick Papers* where the jury made the objective inference desired by Serjeant Buzfuz. Cf. *Henkel v. Pape* (1870), L.R. 6 Ex. 7.

² (1605), Noy 11.

engagements are not to be regarded as contracts is because they are not reducible to a money value, for they often may be. The acceptance of an invitation to dinner or to play in a cricket match,¹ of an offer to award a scholarship upon the result of a competitive examination,² or of an advertisement that a course of lectures will be delivered at a given time, these form agreements in which the promisee may incur expense in reliance on the promise. The damages resulting from breach might be ascertainable, but the Courts would hold that, as no legal consequences could reasonably have been contemplated by the parties, no action would lie.

In *Balfour v. Balfour*,³ for example:

A husband was employed in a government post in Ceylon. He returned with his wife to England on leave, but she was unable to go back to Ceylon with him for medical reasons. He consequently promised orally to make her an allowance of £30 a month until she rejoined him. He failed to make this payment, and she sued him.

The Court of Appeal held that, although it was not impossible for a husband and wife to enter into a contract for maintenance, in this case they never intended to make a bargain which could be enforced in law. Atkin L.J. explained:⁴

... it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife.

The test of an intent to affect legal relations is an objective one. It may be that the promisor never anticipated that his promise would give rise to any legal obligation, but if a reasonable man would consider that he intended so to contract, then he will be bound to make good his promise.⁵ But the presence of a consideration for the promise moving from the promisee is not, in itself, conclusive that such an intent was present.⁶

Sometimes the parties to a business transaction may nevertheless deliberately state that they do not intend to enter into

¹ See Atkin L.J. in *Balfour v. Balfour* (*infra*) at p. 578.

² *Rooke v. Dawson*, [1895] 1 Ch. 480.

³ [1919] 2 K.B. 571.

⁴ At p. 578.

⁵ *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, *infra*, p. 40.

⁶ *Balfour v. Balfour*, [1919] 2 K.B. 571, at p. 578.

Express denial of intention to create legal relations any legal obligation at all. In *Rose and Frank Co. v. Crompton Brothers*:¹

The defendants, a British firm of manufacturers, had had business dealings for some years with the plaintiffs, an American firm. A document was drawn up by which it was, in effect, arranged that the plaintiffs were to be the sole vendors of the defendants' goods in the United States; it contained detailed arrangements for carrying out the business, and proceeded to state that 'this arrangement is not entered into, nor is this memo written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts either of the United States or England.' A dispute having arisen, the defendants terminated the agreement without notice and contrary to its terms, and refused to carry out certain accepted orders then outstanding. The plaintiffs therefore sued them for breach of contract and for non-delivery of the goods.

It was held that the document was not legally binding, and that the plaintiffs were not entitled to damages for breach of its terms, but that the orders already accepted under it constituted legally binding contracts and that they were entitled to damages for non-delivery.

To create a contract [said Atkin L.J.]² there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour v. Balfour*. If the intention may be negatived impliedly it may be negatived expressly. In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both.

Similarly it has been held³ that a competitor who claimed to have sent in a very successful coupon in a football pool, of which one of the conditions was that the conduct of the pools and everything done in connexion therewith was not to 'be

¹ [1925] A.C. 445.

² In the Court of Appeal, [1923] 2 K.B. 261, at p. 293.

³ *Appleton v. Littlewood, Ltd.*, [1939] 1 All E.R. 464; *Jones v. Vernons' Pools, Ltd.*, [1938] 2 All E.R. 626. Cf. *Simpkins v. Pays*, [1955] 1 W.L.R. 975.

attended by or give rise to any legal relationship whatsoever' could have no claim which a Court would enforce.

It is sometimes difficult to distinguish statements of intention which cannot, and are not intended to, result in any obligation *ex contractu* from offers which admit of acceptance, and so become binding promises. A man announces that he will sell goods by tender or by auction, or places goods for sale in a shop window at a certain price; or a railway company advertises that it will carry passengers from *A* to *Z* and to reach *Z* and the intermediate stations at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers, and do business; whether the railway company by its published time-table makes offers which become terms in the contract to carry, or whether it states probabilities in order to induce passengers to apply for tickets.

Distinction
between
offer and
invitation
to treat

Such preliminary statements, if they are not intended to be binding, are known as 'invitations to treat'. We may give some examples of them here:

A shopkeeper who places goods in a shop window marked at a certain price,¹ or upon shelves in a self-service shop,² does not bind himself to sell at that price, or to sell at all. His display is merely an invitation to treat; it is for the customer to offer to buy the goods, and he may accept or refuse the offer as he wishes.

An announcement that goods will be sold by tender unaccompanied by words indicating that they will be sold to the highest bidder, is a 'mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt'.³

A bookseller's catalogue, with prices stated against the names of books, might seem to contain a number of offers, but is in fact merely an invitation to treat; otherwise the bookseller would be obliged to sell to every person who accepted his 'offer' to sell a particular book.⁴

A statement in a railway time-table that a certain train will run at a certain time is an offer capable of acceptance by a passenger who goes to the station to buy a ticket (although time-tables now contain a proviso to the effect that no such legal obligation is to arise).⁵

¹ *Timothy v. Simpson* (1834), 6 C. & P. 499, at p. 500; *Winfield* (1939), 55 L.Q.R. 499, at p. 517.

² *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*, [1953] 1 Q.B. 401.

³ *Spencer v. Harding* (1870), L.R. 5 C.P. 561. See also *Percival v. L.C.C.* (1918), 87 L.J.K.B. 677. ⁴ *Grainger & Son v. Gough*, [1896] A.C. 325.

⁵ *Denton v. Great Northern Railway Co.* (1856), 5 E. & B. 860, *per Lord Campbell and Wightman J.* Cf. the judgment of *Crompton J.* in the same case.

A statement of fact made merely to supply information cannot be treated as an offer, and accepted, so as to create a valid contract. In *Harvey v. Facey*:¹

A telegraphed to *B*, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid.' *B* replied by telegram, 'Lowest price for Bumper Hall Pen £900.' *A* telegraphed, 'We agree to buy Bumper Hall Pen for £900 asked by you.' Bumper Hall Pen was a plot of land, and *A* claimed that this exchange of telegrams constituted a valid offer and acceptance.

The Judicial Committee of the Privy Council pointed out that the first telegram of *A* asked two questions, (i) as to the willingness of *B* to sell, and (ii) as to the lowest price; and that the word 'telegraph' was addressed to the second question only. They held that no contract had been made, that *B* in stating the lowest price for the property was not making an offer but supplying information, that the third telegram set out above was an offer by *A*—not the less so because he called it an acceptance—and that this offer had never been accepted by *B*.

Auction sales 'without reserve' A difficult problem arises in the case of auction sales 'without reserve'.² When goods are put up for sale by auction upon an advertised condition that the sale shall be 'without reserve', the auctioneer thereby indicates to prospective buyers that he will accept the bid of the highest *bona fide* bidder, and that he will not at any stage withdraw the goods, for example, on the ground that the reserve price has not yet been reached. If he does so withdraw the goods, it is said that he makes himself liable for breach of contract with such a bidder. In *Warlow v. Harrison*:³

The defendant, an auctioneer, advertised 'a brown mare, Janet Pride', for sale by auction 'without reserve'. The owner's name was not disclosed. The plaintiff attended the sale and bid 60 guineas; the owner bid 61 guineas, and the defendant knocked down the mare to him. The plaintiff claimed the mare as being the highest *bona fide* bidder.

The Court of Exchequer Chamber thought that on these facts, if they had been properly pleaded, the plaintiff would have been entitled to succeed although the actual decision was to

¹ [1893] A.C. 552.

² See articles by Slade and Gower in (1952), 68 L.Q.R. 238 and 457, and (1953), 69 L.Q.R. 21, and Corbin, *Contracts*, § 81.

³ (1858-9), 1 E. & E. 295, 309. By s. 58 (3) of the Sale of Goods Act, 1893, the seller is now precluded without notification from bidding himself or employing anyone to bid for him, and any sale contravening this rule may be treated as fraudulent by the buyer.

recovery of lost property, there need be no acceptance of the offer other than performance of the condition. It was further argued that the alleged offer was merely an advertisement or puff which no reasonable person would take to be serious. But the statement that £1,000 had been deposited to meet demands was regarded as evidence that the offer was intended to be sincere. Here, then, was a case of an offer which was capable of being accepted by a number of persons, and which had been accepted by Mrs. Carlill when she performed the stipulated conditions.

Acceptance of an Offer

(Acceptance means in general communicated acceptance. Acceptance
What amounts to communication, and how far it is necessary that communication should reach the offeror, are matters to be dealt with presently. It is enough to say here that acceptance must be something more than a mere mental assent; it must be by words or conduct.

In an old case in the Year Books¹ it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the contract was made and the property passed when he had seen and approved of the subject of the sale. But Brian C.J. said:

It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact.

This *dictum* was quoted with approval by Lord Blackburn in the House of Lords in support of the rule that a contract is formed when the acceptor has done something to signify his intention to accept, and not when he has made up his mind to do so. The occasion was the case of *Brogden v. Metropolitan Railway Co.*:²

The plaintiff had for some time supplied the defendants with coal and coke for their locomotives, but without any formal agreement. Subsequently it was suggested that a contract should be entered into between the parties, and a draft agreement was drawn up by the defendants' agent. This was sent to the plaintiff who filled in the blanks (including the name

¹ *Anon.* (1477), Y.B. Pasch. 17 Edw. IV, f. 1, pl. 2.

² (1877), 2 App. Cas. 666.

of an arbitrator) and altered certain words in the agreement. He then signed it and returned it to the defendants marked 'approved'. The defendants' agent put the paper into his drawer where it remained. The parties appear to have ordered and supplied coal upon the terms stated, but, a dispute having arisen between them, the plaintiff contended that he was not bound by the agreement.

The House of Lords rejected his contention. It was clear that, by inserting the name of an arbitrator, the plaintiff had altered the draft agreement in a material particular. The draft agreement could not therefore be regarded as a definitive offer which had been accepted by the plaintiff's indorsement, as his acceptance had not been made in the same terms as the offer.¹ But was it possible to regard the despatch by the plaintiff of the altered agreement as the offer, whose terms had been accepted by the defendants? The mere fact that the defendants' agent had acquiesced in the offer by putting the letter in his drawer was insufficient, as silence could not, of itself, constitute acceptance; but the subsequent ordering and acceptance of coal by the defendants was strong evidence to show that the parties had entered into a contractual relationship on the terms of the draft. The plaintiff was therefore bound.

Mental
acceptance
ineffectual

Thus we see that mental acceptance or mere acquiescence does not amount to acceptance; and this is so even where the offeror has said that such a mode of acceptance will suffice. For although an offeror may specify the mode of acceptance, he cannot prescribe the mode of refusal so as to fix a contract on the other party if he does not refuse in some particular way or within some particular time.² In *Felthouse v. Bindley*, for example:³

Felthouse offered by letter to buy his nephew's horse for £30. 15s., adding, 'If I hear no more about him I shall consider the horse mine at £30. 15s.' No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as it was sold to his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for conversion of his property.

The Court held that as the nephew had never signified to Felthouse his acceptance of the offer, there was no contract of sale, and that the horse did not belong to Felthouse at the time of the auctioneer's dealings with it.

¹ Viz. *infra*, p. 51.

² Pollock, *Principles of Contract* (13th ed.), p. 14.

³ (1862), 11 C.B., N.S. 869. Cf. *Restatement*, § 72.

Also in *Powell v. Lee*.¹

The plaintiff was a candidate for the headmastership of a school, and the board of managers, with whom the appointment lay, passed a resolution selecting him for the post. One of the managers, acting in his individual capacity, informed the plaintiff of what had occurred, but he received no other intimation. Subsequently, the resolution was rescinded, and the plaintiff was not appointed to the post.

The Court held that in the absence of an authorized communication from the whole body of managers there was no completed contract.

The Manner of Acceptance

A contract is formed by the acceptance of an offer. When the offer is accepted, it becomes a promise: until it is accepted neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it is made. Way in which acceptance may be made

We have seen that the acceptance of an offer requires more than a tacit formation of intention. There must be some overt act or speech to give evidence of that intention. But there is a marked difference between an offer and an acceptance in that, whereas an offer is not held to be made until it is brought to the notice of the offeree, acceptance may in certain circumstances be held to have been made even though it has not yet come to the notice of the offeror. In such a case two things are necessary. There must be an express or implied intimation from the offeror that a particular mode of acceptance will suffice. And some overt act must be done or words spoken by the offeree which are evidence of an intention to accept, and which conform to the mode of acceptance indicated by the offeror.

These requirements may be summed up in the general rule that an offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror.

The law on this subject was thus stated by Bowen L.J. in *Carlill v. Carbolic Smoke Ball Co.*:²

One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that *consensus* which is necessary according to the rules of English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be

¹ (1908), 99 L.T. 284.

² [1893] 1 Q.B. 256, at p. 269.

made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

From this statement of the law we may draw the following conclusions.

Communi-
cation

The general principle is that acceptance is not complete unless and until it is communicated to the offeror. As was said by Lindley L.J. in the same case:¹ 'Unquestionably, as a general proposition when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified.' Since, however, notification is for the benefit of the offeror, he may expressly or impliedly waive this requirement and agree that an uncommunicated acceptance will suffice.² He may do this either by indicating a mode in which acceptance should be communicated, and undertaking to be bound by a communication so made, whether it reaches him or not; or he may invite performance of a condition, and it will then be sufficient for the purpose of binding him that the offeree should act on the proposal.

Promise
for an
Act

We will take the latter class of cases first. It is sometimes impossible for the offeree to express his acceptance otherwise than by performance of the contract. This is specially true in the case of general offers, discussed above,³ where an offer is made to the world at large and where performance is expressly indicated as a mode of acceptance. An offer of reward for the supply of information or for the return of a lost dog, does not contemplate an intimation of acceptance from every person who, on becoming aware of the offer, decides to ascertain the information or to search for the dog;⁴ he may already have the information or have found the dog, and he can do no more than send it on to the offeror.

¹ *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, at p. 262.

² *Entores, Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327, at p. 336.

³ *Supra*, p. 39.

⁴ *Carlill v. Carbolic Smoke Ball Co.*, *supra*, at p. 269.

But when a specified individual receives an offer capable of acceptance by performance, we need to consider more carefully the nature and terms of the offer, and whether they entitle the offeree to dispense with notice of acceptance. If *A* tells *B* by letter that he will receive and pay for certain goods if *B* will send them to him, such an offer may be accepted by sending the goods.¹ But if the trustees of a will inform an annuitant under it that they offer to redeem her annuity for cash, and she thereupon, without further communication with them, executes a release of the annuity, no contract for the sale and purchase of the annuity is concluded.² As the Court pointed out, it was impossible to suppose that the purchasers intended their offer to be accepted by the vendor merely executing a document; communication to them of the acceptance was necessary. The circumstances of each case must be taken into account before a decision can be reached.

When we pass from offers of a promise for an act to offers of a promise for a promise, that is, from offers capable of being accepted by performance to offers which require for their acceptance an expression of intention to accept, we find that in certain cases the law, for reasons of convenience, implies an intent to dispense with actual communication, and holds that the offeror is bound even though the acceptance has not reached him. This is so in the case of an acceptance by post or by telegram, *the acceptance being completed when the letter is posted or the telegram handed in.*³

Promise
for a
promise

Acceptance
by post

To understand the steps by which this result has been reached, we must bear in mind that an offer made to one who is not in immediate communication with the offeror remains open and available for acceptance until the lapse of such a time as is prescribed by the offeror, or is reasonable as regards the nature of the transaction.⁴ During this time the offer is a continuing offer and may be turned into a contract by acceptance. So in *Adams v. Lindsell*:⁵

By a letter dated 2nd September, 1817, the defendants offered to sell to the plaintiffs a certain quantity of wool, and added 'receiving your

¹ *Harvey v. Johnston* (1848), 6 C.B. 295, at p. 304.

² *Kennedy v. Thomassen*, [1929] 1 Ch. 426.

³ *Winfield* (1939), 55 L.Q.R. 499, at p. 505. Three principal systems seem to be in operation in other countries: (i) *information*—when the offeror is actually informed of the acceptance; (ii) *expedition*—when the offeree despatches the letter of acceptance; and (iii) *reception*—when the acceptance is received at its destination, whether the offeror is actually informed or not.

⁴ *Viz. infra*, p. 54.

⁵ (1818), 1 B. & Ald. 681.

answer in course of post'. If the letter containing this offer had been properly directed, an answer might have been received by the 7th; but it was misdirected and did not reach the plaintiffs until the 5th so that their acceptance, posted the same day, was not received by the defendants until the 9th. On the 8th, however, that is before the acceptance had arrived, the defendants sold the wool to another. The plaintiffs sued for breach of contract.

The *ratio decidendi* of the case is somewhat complicated by the issue of negligence, it being asserted that the delay was due entirely to the fault of the defendants in misdirecting their offer.¹ But it was argued on behalf of the defendants that there was no contract between the parties until the letter of acceptance was actually received. The Court replied:²

If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter.

The logic of this passage may perhaps be questioned, but it was undoubtedly necessary for the Court to establish some definite rule as to the time of a postal acceptance, and convenience pointed to the time that the letter was posted rather than to the time that it was received by the offeror.

Loss or
delay The Courts showed some hesitation in applying this rule to cases where the letter of acceptance had been lost or delayed in transmission, but the matter was settled by the decision in *Household Fire Insurance Co. v. Grant*:³

The defendant offered to buy shares in the plaintiff's company. The secretary of the company made out the letter of allotment in favour of the defendant and posted it to him, but the letter never reached its destination. The company having become insolvent, the defendant repudiated his liability to pay for the shares.

The Court of Appeal held that he was nevertheless liable as a shareholder:⁴

¹ The case was sent for a new trial.

² *Supra citato*, at p. 683.

³ (1879), 4 Ex. D. 216; *Dunlop v. Higgins* (1848), 1 H.L.C. 381; *British and American Telegraph Co. v. Colson* (1871), L.R. 6 Ex. 108; *Re Imperial Land Co. of Marseilles, Harris's case* (1872), L.R. 7 Ch. App. 587.

⁴ At p. 221; *Hebb's case* (1867), L.R. 4 Eq. 9, at p. 12.

As soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his *agent* to deliver the offer and receive the acceptance.

This line of reasoning attempts to eliminate any difficulties as to *consensus* by treating the post office as the agent of the offeror not only for delivering the offer, but for receiving the notification of its acceptance; but there is a certain artificiality in looking at the transaction in that way. The better explanation would seem to be that, if hardship is caused, as it obviously may be, by the delay or loss of a letter of acceptance, some rule is necessary, and the rule at which the Courts have arrived, whether or not it can logically be supported, is probably as satisfactory as any other would be. In the later case of *Henthorn v. Fraser*,¹ where a written offer, delivered by hand, was accepted by post, and it was held that the contract was concluded from the moment of such acceptance, Lord Herschell merely says:²

I should prefer to state the rule thus: where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

One of the more obvious consequences of this rule is that the offeror must bear the risk of the letter of acceptance going astray. Indeed, it is sometimes said that there is a general rule that where the offeror either expressly or impliedly indicates the mode of acceptance, and this, as a means of communication, proves to be nugatory or insufficient, he does so at his own risk.³ Suppose that *A* sends an offer to *B* by messenger across a lake with a request that *B*, if he accepts, will at a certain hour fire a gun or light a fire. Why, it is asked, should *B* suffer if a storm renders the gun inaudible, or a fog intercept the light of the fire? However, there seems to be no such general rule, at any rate where instantaneous communication is concerned. To use a judicial example,⁴ if an offer is made to a man by telephone, and in the middle of his reply the line goes dead, so that the offeror does not hear his words of acceptance, there is no contract. And if a person shouts to another across

Burden of
risk that
acceptance
may go
astray

¹ [1892] 2 Ch. 27.

² At p. 33.

³ Anson (20th ed.), p. 36.

⁴ *Entores, Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327, per Denning L.J. at p. 332; Winfield (1939), 55 L.Q.R. 499, at p. 514.

a river or courtyard, but the offeror does not hear the reply because it is drowned by an aircraft flying overhead, there is no contract at that moment, and the offeree must repeat his acceptance in order that it may be effective. It seems, then, that the rule as to the risk of acceptance by letter or by telegram is peculiar to these two forms of communication and that they form a special exception to the general principle that acceptance must be communicated to the offeree.

Place of
acceptance

This contention is fully borne out when we consider the cases which determine *where* a contract is made. This may be of importance when it is necessary to inquire by the law of which of two countries, or jurisdictions, the validity of the contract or the procedure for its enforcement is to be ascertained. In *Entores, Ltd. v. Miles Far East Corporation*:¹

The plaintiffs were an English company with an office in London. The defendants were an American company with an office in Amsterdam, Holland. Each company had a teleprinter machine in its office, and by a system known as 'Telex' could get into direct and almost instantaneous communication with the other. The plaintiffs made an offer to the defendants by 'Telex' to sell them a quantity of metal, and the defendants accepted by the same method. A dispute having arisen between the parties, the plaintiffs sought to serve notice of a writ on the defendants in America, a step which would normally only be allowed if the contract had been made in England.

The Court of Appeal held that leave should be given. Since a contract made by 'Telex' was no exception to the general rule that acceptance is not complete until communicated, it was clear that the contract was made when the plaintiffs received the reply, and this took place in London. But when the means of communication is by letter or telegram, a different rule prevails. The contract is complete when the letter is posted or the telegram is handed in, and it is there that the contract is made. So in *Cowan v. O'Connor*² a contract was made by two telegrams—one of offer and one of acceptance. The amount at issue made it necessary that the whole cause of action should arise within the jurisdiction of the Court (The Mayor's Court in the City of London) in which the action was to be tried. The telegram of acceptance had been sent from the City, and the Court held that the contract was made there, and that consequently the whole cause of action arose within the jurisdiction of the Mayor's Court.

¹ [1955] 2 Q.B. 327.

² (1888), 20 Q.B.D. 640.

If the terms or the circumstances of the offer do no more than suggest a mode of acceptance, it seems that the offeror would not be bound to this mode so long as he used one which did not cause delay, and which brought the acceptance to the knowledge of the offeror. A departure from the usual or suggested method of communication would probably throw upon the offeree the risk that the acceptance would be delayed, but, subject to this, an offer delivered by hand could be accepted by post, or an offer made by post could be accepted by messenger sent by train. If, however, the offeror expressly indicates the method of communication is it open to him to treat any departure from this method as a nullity? In an American case, *Eliason v. Henshaw*:¹

Unauthor-
ized modes

Eliason offered to buy flour from Henshaw, requesting that an answer should be sent by the wagon which brought the offer. Henshaw sent a letter of acceptance by mail, thinking that this would reach Eliason more speedily. He was wrong, and the letter arrived after the time that the reply might have been expected.

The Supreme Court of the United States held that Eliason was entitled to refuse to purchase:²

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it.

It will be noted, however, that, in this case, the method chosen proved to be less expeditious than that chosen by the offeror, and there would seem to be no supportable reason why an equally rapid, and acceptable, method should not be sufficient,³ unless the offeror has stipulated that acceptance shall be made in that way only and in no other manner.⁴

One final problem remains: the question of the revocation of an acceptance. Since the general rule is that acceptance is not complete until it has been communicated to the offeree, it follows that an acceptance can be revoked at any time before this occurs, provided, of course, that the revocation itself is communicated before the acceptance arrives. But what is the

Revocation
of an
acceptance

¹ (1819), 4 Wheaton 225.

² *Ibid.*, per Washington J. at p. 228.

³ *Tinn v. Hoffman & Co.* (1873), 29 L.T. 271, at pp. 274, 278; *Restatement* § 68; Winfield (1939), 55 L.Q.R. 499, at p. 516.

⁴ *Kingston-upon-Hull (Governors &c.) v. Petch* (1854), 10 Ex. 610; Winfield (1939), 55 L.Q.R. 499, at p. 514.

position in relation to postal acceptances? Since the acceptance is complete as soon as the letter of acceptance is put into the post office, a telegram revoking the acceptance would be inoperative, though it reached the offeror before the letter. This, it is argued, is both the logical and fair conclusion; otherwise the offeree could blow both hot and cold, having the benefit of certainty in his postal acceptance, and the opportunity to revoke it if it turned out suddenly to be to his disadvantage. On the other hand, it is contended that the offeror can in no way be prejudiced by such a revocation, as he could not know of the acceptance until it arrived, by which time he would already be aware of the revocation. There is no English authority on this point. In a Scots case, *Countess of Dunmore v. Alexander*,¹ where a letter of revocation arrived simultaneously with the letter of acceptance, it was held that no contract existed. But the better view is that the offeree cannot so revoke.² It is perfectly possible for him to send a qualified acceptance: 'I accept unless you get a revocation from me by telegram before this reaches you'; or he could telegraph a request for more time to consider. If he chooses to send an unconditional acceptance there is no reason why he should have the opportunity of changing his mind which he would not have enjoyed if the contract had been made *inter praesentes*.

Offer and Acceptance must correspond

Acceptance must be absolute If a contract is to be made, the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the coincidence of the terms of the acceptance with those of the offer. These requirements may be summed up in the general rule that the acceptance must be absolute, and must correspond with the terms of the offer.

Inconclusive acceptances The kinds of difficulty which arise in determining whether or not an acceptance is conclusive may be said to be three. The alleged acceptance may be (a) a rejection and counter-offer; (b) an acceptance with some variation or addition of terms; or

¹ (1830), 9 Shaw & Dun. 190, *per* Lord Craigie (dissenting) as an acceptance.

² *Wenckheim v. Arndt* (N.Z.), 1 J.R. 73; Pollock, *Principles of Contract* (13th ed.), p. 28; Benjamin on *Sale of Personal Property* (8th ed.), p. 83; Chitty, *Law of Contracts* (21st ed.), p. 31; Cheshire and Fifoot, *Law of Contract* (4th ed.), p. 44; Winfield (1939), 55 L.Q.R. 499, at p. 512. Cf. Bramwell B. (dissentiente) in *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216, at p. 235.

(c) an acceptance of a general character, to be limited and defined by subsequent arrangement of terms.

(a) *Rejection and counter-offer*

A counter-offer cannot constitute an acceptance of an offer; it amounts to a rejection of the offer, and so operates to bring ^{Counter-offer} it to an end.

In *Hyde v. Wrench*,¹ for example:

A offered to sell a farm to *B* for £1,000. *B* said he would give £950. *A* refused, and *B* then said he would give £1,000, and, when *A* declined to adhere to his original offer, tried to obtain specific performance of the alleged contract.

The Court, however, held that an offer to buy at £950 in response to an offer to sell for £1,000 was a refusal followed by a counter-offer, and that no contract had come into existence. But an inquiry as to whether the offeror will modify his terms does not necessarily amount to a counter-offer. So in *Stevenson v. McLean*,² the offeree could still accept an offer of a certain quantity of iron 'at 40s. nett cash per ton', even though he had telegraphed to the offeror requesting information as to possible terms of credit. He did not intend to reject the offer and to make a counter-offer of his own, but merely to make a business inquiry.

(b) *Change of terms*

The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is made, for the offeree in effect refuses the offer and makes a counter-offer of his own. <sup>Introduc-
tion of
new terms</sup>

In the case of *Jones v. Daniel*:³

A offered £1,450 for a property belonging to *B*. In accepting the offer *B* enclosed with the letter of acceptance a contract for the signature of *A*. This document contained various terms as to payment of deposit, date of completion, and requirement of title which had never been suggested in the offer.

The Court held that there was no contract; it would be equally unfair to *A* to hold him to the terms of acceptance, and to *B* to hold him to the terms of the offer. Similarly it will be remembered that in the case of *Brogden v. Metropolitan Railway Co.*,⁴ the insertion by the offeree of the name of an arbitrator

¹ (1840), 3 Beav. 334.

² (1880), 5 Q.B.D. 346.

³ [1894] 2 Ch. 332.

⁴ (1877), 2 App. Cas. 666, *supra*, p. 41.

into the prepared draft contract amounted to a material alteration in its terms so that the acceptance did not correspond with the offer; but the contract, when altered, constituted a counter-offer which could be accepted when the original offerors placed orders under the contract and in accordance with its terms.

(c) *Acceptance in general terms*

Reference to existing terms—
good In cases where the offer or acceptance is couched in general terms, but reference is made to a contract in which the intentions of the parties may be more precisely stated, it is important to ask whether the terms of such a contract were in existence and known to the parties, or whether they were merely in contemplation. In the former case the offer and acceptance are made subject to, and inclusive of, the fuller conditions and terms; in the latter case the acceptance is too general to constitute a contract.

Two examples may be given of agreements which were held to be sufficiently definite and binding:

An oral offer was made to purchase land. The offeror was told that the land must be purchased under certain printed conditions, and the offer, which was still continued, was accepted 'subject to the conditions and particulars printed on the plan'. As these were contemplated in the offer, a completed contract was thus constituted.¹

An offer was made to buy land, and 'if offer accepted, to pay deposit and sign contract on the auction particulars'; this was accepted, 'subject to contract as agreed'. The acceptance clearly embodied the terms of the contract mentioned in the offer, and constituted a complete contract.²

Reference to future terms—
bad On the other hand in *Winn v. Bull*:³

A written agreement was drawn up whereby the defendant agreed to take a lease of a house for a definite period and at a fixed rent, but 'subject to the preparation and approval of a formal contract'.

It was held there was no contract. Jessel M.R. explained:⁴

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether

¹ *Rossiter v. Miller* (1878), 3 App. Cas. 1124.

² *Filby v. Hounsell*, [1896] 2 Ch. 737.

³ (1877), 7 Ch. D. 29.

⁴ At p. 32.

the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.

So although the phrase 'subject to contract' or 'subject to formal contract' is often inserted in agreements for the sale or lease of land, it is clear that it renders the agreement nugatory in fact.¹ It is otherwise where the parties use the phrase 'a provisional agreement', for then they agree to be bound from the beginning, even though they contemplate a more formal agreement later on.²

There are cases which at first sight may appear to be cases of doubt or difference in the acceptance of an offer, but really turn out to involve only questions of the admissibility of evidence or the interpretation of terms. Such a case may occur when the parties have made a written agreement, depending for its coming into effect on an oral condition or stipulation. If, for example, the parties agree in writing to buy and sell goods, but orally provide that the sale is not to take place unless the approval of a third party is gained, the contract is held in abeyance until the condition is fulfilled; and this condition, though oral, is admitted in evidence as forming part of the written agreement.³

Such, too, are cases in which a contract has to be made out of a correspondence involving lengthy negotiations. The parties discuss terms, approach and recede from an agreement; offers are made and met by the suggestion of fresh terms; finally there is a difference; and one of the parties asserts that a contract has been made, and the other that matters have never gone beyond the discussion of terms. Where such a correspondence appears to result, at any moment of its course, in a definite offer and acceptance it is necessary to ask whether this offer and acceptance amounts to a completed agreement, for it is possible that there may be other terms under discussion which have not been settled between the parties.⁴ Where, however, the correspondence shows that the parties have definitely come to terms, a subsequent revival of negotiations cannot, except with the consent of the parties, affect the contract so made.⁵

¹ In the absence of exceptional circumstances: *Chillingworth v. Esche*, [1924] 1 Ch. 97.

² *Branca v. Cobarro*, [1947] K.B. 854.

³ *Pym v. Campbell* (1856), 6 E. & B. 370, *infra*, pp. 110, 131.

⁴ *Hussey v. Horne Payne* (1879), 4 App. Cas. 311.

⁵ *Perry v. Sufield's, Ltd.*, [1916] 2 Ch. 187, at p. 191.

But these cases turn rather on the meaning to be given to the words of the parties than on rules of law.¹

Termination of the Offer

Lapse and
revocation
of offer

Acceptance is to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have laid until it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance. Also the offeree may decide to reject the offer. Until an offer is accepted, it creates no legal rights, and it may be terminated at any time.

(a) *Lapse*

Death of
parties

The death of either party before acceptance would seem to cause an offer to lapse. At any rate it is clear that the offeree cannot accept after he is informed of the death of the offeror;² an acceptance communicated to the offeror's personal representatives cannot bind them. But what will be the position if the offeree accepts in ignorance of the offeror's death? The generally accepted view is that the offer is terminated automatically and that knowledge is irrelevant.³ In *Coulthart v. Clementson*,⁴ however, a continuing contract of guarantee was held to be enforceable against the estate of the guarantor, even though the acceptance of an offer to guarantee fresh credit was made after his death. But this case is probably confined to the very special facts of a continuing guarantee; normally, death *ipso facto* terminates the offer. The same principle would seem to apply to the death of the offeree;⁵ his personal representatives could not accept the offer on behalf of his estate.

Passing of
time

An offer may also be considered to have lapsed owing to the passing of time. Sometimes the parties expressly fix a time within which an offer is to remain open. Instances of such a prescribed time are readily supplied. 'This offer to be left open until Friday, 9 a.m. 12th June', allows the offeror to revoke, or the offeree to accept the offer, if unrevoked, at any

¹ Viz. *infra*, p. 138.

² *Coulthart v. Clementson* (1879), 5 Q.B.D. 42.

³ *Dickinson v. Dodds* (1876), 2 Ch. D. 463, at p. 475; *Kennedy v. Thomassen*, [1929] 1 Ch. 426. ⁴ (1879), 5 Q.B.D. 42.

⁵ *Reynolds v. Atherton* (1921), 125 L.T. 690, at p. 695; affirmed (1922), 127 L.T. 189.

time up to the hour named, after which the offer would lapse.¹ Similarly, an offer to supply goods of a certain sort at a certain price for a year from the present date,² or an offer to guarantee the payment of any bills of exchange discounted for a third party for a year from the present date,³ are offers which may be turned into contracts by the giving of an order in the one case, the discount of bills in the other. Such offers may be revoked at any time, except as regards orders already given or bills already discounted, and they will, in any event, lapse at the end of a year from the date of offer.

In most cases, however, the offeror will not specify any particular time, and it is left to the Court, in the event of litigation, to say what is a reasonable time within which an offer may be expected. We have already seen that an offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror.⁴ If the circumstances of the offer, for example, if it is made by telegram, suggest that a reply is required urgently, the offer will be considered to have lapsed if the offeree does not quickly make up his mind whether to accept, or if he chooses a means of communication which will delay the notification of his acceptance. In other cases, the efflux of a reasonable time will terminate the offer. An instance of this is provided by *Ramsgate Victoria Hotel Co. v. Montefiore*:⁵

The defendant, Montefiore, offered by letter dated the 28th June to purchase shares in the plaintiff company. No answer was received by him until the 23rd of November, when he was informed that shares were allotted to him. He refused to accept them.

It was held that his offer had lapsed by reason of the delay of the company in notifying their acceptance, and that he was not bound to accept the shares.

(b) Revocation

The law relating to the revocation of an offer may be Revocation summed up in two rules:

1. An offer may be revoked at any time before acceptance.
2. An offer is made irrevocable by acceptance.

The first of these rules may be illustrated by the case of *Offord v. Davies*:⁶

Valid
before
acceptance

¹ *Dickinson v. Dodds* (1876), 2 Ch. D. 463.

² *Great Northern Railway Co. v. Witham* (1873), L.R. 9 C.P. 16.

³ *Offord v. Davies* (1862), 12 C.B., N.S. 748.

⁴ *Supra*, p. 43.

⁵ (1866), L.R. 1 Ex. 109.

⁶ (1862), 12 C.B., N.S. 748.

The defendants made a written offer to the plaintiff that, if he would discount bills for another firm, they (the defendants) would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months. Some bills were discounted by the plaintiff, and duly paid, but before the twelve months had expired the defendants, the guarantors, revoked their offer and notified him that they would guarantee no more bills. The plaintiff continued to discount bills, some of which were not paid, and then sued the defendants on the guarantee.

It was held that the revocation was a good defence to the action. The alleged guarantee was an offer, for a period of twelve months, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, *pro tanto*, but the entire offer could at any time be revoked except as regards discounts made before notice of revocation.

It will be noted that the mere fact that the defendants in *Offord v. Davies* promised to guarantee payment for twelve months did not preclude them from revoking before that period had elapsed. It is a rule of English law that a promise to keep an offer open needs consideration to make it binding and would thus only become so if the offeror gets some benefit, or the offeree incurs some detriment, in respect of the promise to keep the offer open. The offeree in such a case is said to 'purchase an option'; that is, the offeror, in consideration usually of a money payment, binds himself not to revoke his offer during a stated period. In this case the offeror by his promise precludes himself from exercising his right to revoke the offer; but where he receives no consideration for keeping the offer open, he says in effect, 'You may accept within such and such a time, but this limitation is entirely for my benefit, and I make no binding promise not to revoke my offer in the meantime.'

Exceptions This rule has been criticized,¹ but, subject to two exceptions, it seems to be good law.

Offers under seal The first of these exceptions relates to offers under seal. There is no doubt that a grant under seal is binding on the grantor and those who claim under him though it has never been communicated to the grantee, if the deed has been duly 'delivered';² and it would seem that an offer by deed is on the

¹ The Law Revision Committee recommended that 'an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration': Sixth Interim Report (1937), Cmd. 5449.

² *Macedo v. Stroud*, [1922] 2 A.C. 330. 'Delivery' of a deed does not necessarily involve the handing of it over to the other party to the contract: viz. *infra*, p. 63.

same footing. The offeror is bound, but the offeree need not take advantage of the offer unless he chooses to do so; he may reject it, and then it lapses. The situation in such a case is no doubt anomalous, but an offer under seal is *factum*, a thing done beyond recall;¹ and the offeror is in the position of one who has made an offer which he cannot withdraw, or a conditional promise depending for its operation on the assent of the promisee.

The second exception is statutory. By section 50 (5) of the Companies Act, 1948,² where a prospectus is issued generally, that is, to persons who are not existing shareholders or debenture holders of the company, an application for shares cannot be withdrawn until after the expiration of the third day after the time of the opening of the subscription lists. Prospectus
of company

The rule that an offer is made irrevocable by acceptance is illustrated by the *Great Northern Railway Co. v. Witham*,³ a transaction which, like that in *Offord v. Davies*, involved a continuing relationship: Irrevocable
after
acceptance

The plaintiff company advertised for tenders for the supply of such iron articles as they might require between 1st November, 1871, and 31st October, 1872. The defendant sent in a tender to supply the articles required on certain terms and in such quantities as the company 'might order from time to time', and his tender was accepted by the company. Orders were given and executed for some time on the terms of the tender but finally the defendant was given an order which he refused to execute. The Company sued him for breach of contract in that he had failed to perform this order.

It is important to note the exact relationship of the parties. The company by advertisement invited all dealers in iron to make tenders, that is, to state the terms of the offers which they were prepared to make. The tender of the defendant stated the terms of an offer which might be accepted at any time, or any number of times, in the ensuing twelve months. The acceptance of the tender did not in itself make a contract; it was merely an intimation by the company that they regarded the defendant's tender as a standing offer, which on their part they would be willing to accept as and when they required the articles to be supplied. Each fresh order constituted an acceptance of this standing offer. If the defendant wished to revoke his offer he could have done so, but only as to the future; in the meantime he

¹ *Hall v. Palmer* (1844), 3 Hare 532.

² 11 & 12 Geo. VI, c. 38.

³ (1873), L.R. 9 C.P. 16.

was bound to perform any order already made. The Court therefore held that he was liable for breach of contract.

In this class of case much turns on the forms of invitation, tender, and acceptance actually adopted by the parties, and for that reason the decisions of the Courts upon them appear sometimes somewhat difficult to reconcile. The legal relations which may result from the acceptance of a tender are classified thus by Atkin J.:¹

It is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all; in other words, the contractor offers to supply goods at a price, and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound. There is also an intermediate contract that can be made in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course, if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do need some of the articles the subject of the tender, and do not take them from the tenderer.

Nevertheless, whatever may be the precise form of the obligation, once a contract has been concluded by the acceptance of an offer, it is no longer open to the offeror to revoke and withdraw from the transaction.

Unilateral
contracts

Some difficulty is experienced in the case of 'unilateral' contracts, previously referred to,² where an act is done in return for a promise. If the doing of the act also constitutes the acceptance of the offer, as where an offeree finds and returns a lost dog, at what point in time is the acceptance complete? The usual answer to this question is that the acceptance is complete only where the act has actually been fully performed.³ It follows then that up to this time the offeror is at liberty to revoke his offer. If, for example, a firm of breakfast food manufacturers were to offer to pay £100 to any person who consumed one hundredweight of their breakfast food within

¹ *Percival, Ltd. v. London County Council Asylums and Mental Deficiency Committee* (1918), 87 L.J.K.B. 677, at p. 678.

² *Supra*, p. 28.

³ *Supra*, p. 27. See also *Petterson v. Pattberg* (1928), 248 N.Y. 86.

the next three months, they would be able to revoke their offer after two months had elapsed—to the detriment of those who had almost completed their part of the bargain, and with profit to themselves. Or, to use a judicial example,¹ if one man offers another £100 if he will go to York, he can revoke when the other is half-way there. In order to avoid such an iniquitous result, Sir Frederick Pollock proposed² that a distinction should be drawn between the acceptance of an offer and the consideration therefor; the acceptance is complete once the offeree has begun to execute the contract, but the consideration is not furnished until the act has been performed. It has also been suggested³ that every such offer impliedly contains yet another, namely, not to revoke once the offeree has started to carry out the act. In any event, the problem is not a serious one,⁴ for it is clear that, although the offeree may impliedly dispense with notification of acceptance in the case of a unilateral contract, he will be bound if he actually receives notice that his offer has been accepted. There will be a contract to pay the promised amount, but this will be conditional upon performance of the stipulated act by the promisee.

It remains to state that revocation, as distinguished from lapse, if it is to be operative, must be communicated. In the case of acceptance we have seen that, in certain circumstances, it is not necessary that the acceptance should have actually come to the notice of the offeror; the posting of a letter, the doing of an act, may constitute an acceptance and make a contract. Can revocation of an offer be communicated in the same way, by the posting of a letter of revocation, or by the sale to *A* of an article offered to *B* to purchase? There can be no real doubt that such methods are insufficient and that revocation of an offer is not communicated unless brought to the knowledge of the offeree. The law on this subject was settled in *Byrne v. Van Tienhoven*:⁵

Revocation
must be
communi-
cated

¹ Brett J. in *Great Northern Railway Co. v. Witham* (1873), L.R. 9 C.P. 16, at p. 19.

² Pollock, *Principles of Contract* (13th ed.), p. 19.

³ *Restatement*, § 45.

⁴ In their Sixth Interim Report (1937), the Law Revision Committee recommended that once execution had begun it should be no longer possible for the offeror to revoke his offer (pp. 23, 31).

⁵ (1880), 5 C.P.D. 344; *Stevenson v. McLean* (1880), 5 Q.B.D. 346; *Henthorn v. Fraser*, [1892] 2 Ch. 27. But in *Shuey v. United States* (1875), 92 U.S. 73, where a reward was offered in a newspaper, it was held that this offer could be 'withdrawn through the same channel by which it was made', even though the revocation did not come to the notice of the offeree.

The defendant, writing from Cardiff on 1st October, made an offer to the plaintiffs in New York asking for a reply by cable. The plaintiffs received the letter on the 11th, and at once accepted in the manner requested. In the meantime, however, the defendant had, on the 8th October, posted a letter revoking the offer. This letter did not reach the plaintiffs until the 20th.

The questions which Lindley J. considered to be raised were two: (1) Has a revocation any effect until communicated? (2) Does the posting of a letter of revocation amount to a communication to the person to whom the letter is sent? He held, first, that a revocation was inoperative until communicated, and secondly that the revocation of an offer was not communicated by the mere posting of a letter; therefore the plaintiffs' acceptance on the 11th of October could not be affected by the fact that the defendant's letter of revocation was already on its way. He pointed out the inconvenience which would result from any other conclusion:¹

If the defendant's contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The rule was even more succinctly stated by Lord Herschell in the case of *Henthorn v. Fraser*:²

The grounds on which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made.

The result is that, in law, an offeror may be bound by an agreement which he does not believe himself to have made; but, again, if one of the two parties must suffer, there would seem no good reason why it should be the offeree rather than the offeror.

The case of *Dickinson v. Dodds*³ has been thought to suggest that when an offer is an offer to sell property it may be revoked

¹ At p. 348.

² [1892] 2 Ch. 27, at p. 32; *supra*, p. 47.

³ (1876), 2 Ch. D. 463.

merely by the sale of the property to a third person, and without communication to the offeree:

On the 10th June, 1874, Dodds gave to Dickinson a memorandum in writing offering to sell certain premises for £800, and stating that this offer would remain open until 9 a.m. on June 12th. On the 11th, however, he sold the property to a third person without notice to Dickinson. As a matter of fact Dickinson was informed of the sale, though not by anyone acting under the authority of Dodds. Nevertheless he proceeded to give notice before 9 a.m. on the 12th that he accepted the offer to sell. He then brought an action for specific performance of the contract.

The Court of Appeal held that there was no contract. James L.J., after stating that a promise to keep the offer open could not be binding, and that at any moment before a completed acceptance of the offer one party was as free as the other, went on to say:¹

It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer'. I apprehend that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, *beyond all question, the plaintiff knew* that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer'.

If this language was intended to suggest that a revocation in fact of an offer without the knowledge of the offeree would avail against an acceptance by the offeree within the prescribed time, it must be regarded as an expression of the old *consensus* theory of contract,² and as of no authority today. But the language is more reasonably open to the construction that the Court treated the question of the offeree's knowledge of the revocation as vital to the decision, and so established a rule that an offeree cannot accept an offer which he knows to have been withdrawn.

If this is so, must we then hold that information of the offeror's intention to revoke, from whatever source it reaches the offeree, is good notice of revocation? The inconvenience might be grave. Suppose a merchant to receive an offer of a

¹ At p. 472.

² Viz. *supra*, p. 4.

consignment of goods from a distant correspondent, with liberty to reserve his answer for some days. In the meantime an unauthorized person tells him that the offeror has sold or promised the goods to another. What is he to do? His informant may be right, and then, if he accepts, his acceptance may be worthless. Or his informant may be a gossip or mischief-maker, and if on such authority he refrains from accepting, he may lose a bargain. The answer would appear to be that it is open to an offeror, who has revoked an offer without direct communication to the offeree, to show that the offeree knew, from a trustworthy source, that the offer had been withdrawn.¹ The Court would have to decide every such case on the facts presented, but the onus would be upon the offeror to establish the reasonableness or otherwise of the offeree's belief.

(c) *Rejection*

Rejection
by offeree

An offer will be held to have terminated once it has been rejected by the offeree.

The rejection need not be express, provided that the offeror is justified in inferring that the offeree does not intend to accept the offer.² It would seem, therefore, that a rejection would not operate so as to destroy the power of acceptance until it comes to the notice of the offeror:

Suppose that *A* makes an offer to *B* by letter. Immediately on receiving the letter *B* writes a letter rejecting the offer. Before the rejection arrives, *B* changes his mind and telephones his acceptance.

There would be a contract between *A* and *B*.³ It should not be supposed, however, that an uncommunicated rejection would always be without effect. It would, in certain circumstances, preclude the operation of the rule that a letter of acceptance is complete when posted:

Suppose that *C* makes an offer to *D*. Immediately on receiving the letter *D* writes a letter rejecting the offer. Before the rejection arrives, *D* changes his mind and posts a letter accepting the offer.

Although there is no English authority on this point, it would not seem possible for *D* to claim that the normal rule as to postal acceptance applied. The letter of acceptance would only create an obligation if received by the offeror before the rejection.⁴

¹ *Cartwright v. Hoogstool* (1911), 105 L.T. 628. ² *Restatement*, § 36.

³ *Winfield* (1939), 55 L.Q.R. 499, at p. 513; *Restatement*, § 39.

⁴ *Restatement*, § 39.

CHAPTER III

FORM AND CONSIDERATION

ENGLISH law recognizes only two kinds of contract, the contract made by deed, that is to say, under seal, which is called a Covenant or Specialty, and the simple contract. The contract under seal depends for its validity on its form alone. Simple contracts depend on the presence of consideration, and as a rule they need be made in no special form. But on some simple contracts the law imposes, in addition to the requirement of consideration, the necessity of some kind of form, either as a condition of their existence, or as a requisite of proof. We shall therefore deal with this topic under three headings: (1) Contracts under Seal, (2) Simple Contracts required to be in Writing, and (3) Consideration.

I. CONTRACTS UNDER SEAL

The Contract under Seal derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but solely from the *form* in which it is expressed. Let us consider (1) how the contract under seal is made, and (2) in what circumstances it is necessary to employ it.

How a Deed or Specialty is made

A deed must be in writing or printed, on paper or parchment. It is often said to be executed, or made conclusive as ^{Deed or specialty} between the parties, by being 'signed, sealed, and delivered'. Formerly there was some doubt as to the necessity for a signature, but now by the Law of Property Act, 1925, section 73,¹ a person executing a deed must either sign or make his mark, and sealing alone is not sufficient. Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating a present intention that the deed should become operative² though it is retained in the possession of the party executing.³ In the execution of a deed

¹ 15 & 16 Geo. V, c. 20.

² *Xenos v. Wickham* (1867), L.R. 2 H.L. 296.

³ *Macedo v. Stroud*, [1922] 2 A.C. 330; Cf. *MacKinnon v. White* (1956), 5 D.L.R. (2d) 766.

In modern times seals are commonly affixed beforehand; in fact they are often very much of a legal fiction, being no longer wax impressions of a man's crest or coat of arms, but merely adhesive wafers attached by the law stationer to the document.¹ The party executing the deed signs his name, places his finger on the seal intended for him, and utters (or is supposed to utter) the words 'I deliver this as my act and deed'. Thus he identifies himself with the seal and indicates his intention to deliver, that is, to give operation to the deed.

Escrow A deed may be delivered subject to a condition; it then does not take effect until the condition is performed. During this period it is termed an *escrow*, but immediately upon the fulfilment of the condition it becomes operative and acquires the character of a deed. There is an old rule that a deed, thus conditionally delivered, must not be delivered to one who is a party to it, else it takes effect at once, on the ground that a delivery in fact outweighs oral conditions. But the modern cases appear to show that the intention of the parties prevails if they clearly meant the deed to be delivered conditionally.²

When it is Essential to Employ the Contract under Seal

Need Seal Statute sometimes makes it necessary for the validity of a contract to employ the form of a deed; e.g. a conveyance of land or any interest therein, or a lease for a term exceeding three years, must be made under seal in accordance with the provisions of the Law of Property Act, 1925.³

Common law requires in two cases that a contract should be made under seal:

- (a) A gratuitous promise, or contract in which there is no consideration for the promise made on one side and accepted on the other, is void unless made under seal.
- (b) A corporation aggregate can only be bound by contracts under the corporate seal.⁴

But it should be understood that, either to give particular solemnity to the contract, or to secure certain advantages which

¹ See the criticism of contracts under seal contained in the memorandum of Goddard L.J. in the Sixth Interim Report of the Law Revision Committee (1937), p. 35 (Cmd. 5449).

² *London Freehold and Leasehold Property Co. v. Lord Suffield*, [1897] 2 Ch. 608, at p. 621.

³ 15 & 16 Geo. V, c. 20, ss. 52, 54.

⁴ *Infra*, p. 195.

are the peculiar attributes of a seal, contracts are frequently made under seal in circumstances in which there is no legal obligation to employ that form.¹

II. SIMPLE CONTRACTS REQUIRED TO BE IN WRITING

We have now dealt with the contract which is valid by reason of its form alone, and we pass to the contract which depends for its validity upon the presence of consideration. Simple contracts

These simple contracts are also often called *parol* contracts because they can be entered into by word of mouth. In certain exceptional cases, however, the law requires writing, sometimes as a condition of the validity of the parol contract itself, but sometimes only as evidence without which it cannot be enforced. But it should always be borne in mind that consideration is as necessary in these contracts as in those in which no writing is required: 'if contracts be merely written and not specialties, they are parol and consideration must be proved'.² may require writing

The principal statutory requirements of form in simple contracts are briefly as follows:

(1) A bill of exchange or promissory note must be made in writing. This is required by the Bills of Exchange Act, 1882,³ which further provides that the acceptance of a bill of exchange must also be in writing.

(2) A contract for the repayment of money lent by a moneylender is not enforceable unless a note in writing containing all the terms of the contract has been signed by the borrower.⁴

(3) Contracts of Marine Insurance must be made in the form of a policy.⁵

(4) An acknowledgement of a debt barred by the Limitation Act must be in writing signed by the debtor or his agent duly authorised.⁶

(5) A hire-purchase agreement must be supported by a note or memorandum in writing signed by the hirer and by or on behalf of all parties to the agreement. This note or memorandum must contain certain terms of the agreement.⁷

¹ One of the most common uses nowadays of a sealed instrument (outside conveyances of land) is that of a sealed covenant for a seven year payment to some charitable object, whereby the charity is enabled to claim the income tax paid by the donor in addition to the covenanted sum.

² *Rann v. Hughes* (1778), 7 Term R. 350 (n.).

³ 45 & 46 Vict., c. 61, ss. 3 (1), 17 (2).

⁴ Moneylenders Act, 1927 (17 & 18 Geo. V, c. 12), s. 6.

⁵ Marine Insurance Act, 1906 (6 Edw. VII, c. 41), s. 22.

⁶ Limitation Act, 1939 (2 & 3 Geo. VI, c. 21), s. 24.

⁷ Hire-Purchase Act, 1938 (1 & 2 Geo. VI, c. 53), s. 2.

Before 1954, however, the most important examples of contracts which required writing were provided by those specified in the Statute of Frauds, 1677.¹ Sections 4 and 17 of the Statute of Frauds (which were re-enacted in later Statutes)² rendered certain types of contract unenforceable unless they were evidenced by writing. The object of these provisions, as the name of the Statute implies, was to prevent fraud. But almost from its inception, this requirement of writing exhibited a tendency to encourage, rather than to prevent, dishonest dealing. The attempts of the judges consequently to circumvent the Statute, and the niceties of legal learning which resulted, rendered its operation both arbitrary and artificial. It became almost universally unpopular. By the Law Reform (Enforcement of Contracts) Act, 1954,³ most of these provisions, together with their re-enacting Statutes,⁴ were repealed.

Two classes of contract were, however, exempted from this repeal. These are (1) Contracts of Guarantee,⁵ and (2) Contracts for the Sale of Land.⁶ Section 4 of the Statute of Frauds was left sufficiently intact to provide for formal requirements in these two cases:

No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; . . . or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

It is necessary to consider these points in greater detail.

Contracts of Guarantee

Guarantee The actual words of the Statute read: 'any special promise to answer for the debt, default, or miscarriage of another person'. This is a promise of guarantee, or suretyship. It is always reducible to this form: 'Deal with X, and if he does not pay you, I will.'

¹ 29 Car. II, c. 3.

² Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 4; Law of Property Act, 1925 (15 & 16 Geo V, c. 20), s. 40 (1).

³ 2 & 3 Eliz. II, c. 34. For a commentary on this Act see Grunfeld (1954), 17 Mod. L.R. 451.

⁴ Sale of Goods Act, 1893, s. 4.

⁵ For the competing views on this topic, see the Sixth Interim Report of the Law Revision Committee (1937), Cmd. 5449, and the First Report of the Law Reform Committee (1953), Cmd. 8809.

⁶ See the Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), s. 40 (1).

This promise must be distinguished from a contract of indemnity, that is to say, from a promise to save another harmless from the result of a transaction into which he enters at the instance of the promisor. The distinction is of great practical importance, because a contract of indemnity, unlike that of guarantee, does not require to be evidenced by writing of any sort. In a contract of guarantee there must always be three parties in contemplation: a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who, in consideration of some act or promise on the part of the creditor, promises to discharge the debtor's liability *if the debtor should fail to do so*. In a contract of indemnity, however, the promisor makes himself primarily liable and undertakes to discharge the liability *in any event*. differs from indemnity

The case of *Guild & Co. v. Conrad*¹ affords an illustration both of a guarantee and of an indemnity:

The plaintiff, at the request of the defendant, accepted bills of exchange drawn on a firm of Demerara merchants, receiving a promise from the defendant that he would, if necessary, meet the bills at maturity. Later the firm got into difficulties and the defendant promised the plaintiff that if he would accept a further batch of bills the funds should in any event be provided.

It was held that the first promise was a guarantee, the second an indemnity. Davey L.J. said:²

In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not.

In a contract of guarantee there must, in fact, be an expectation that another person will pay the debt for which the promisor makes himself liable. If the promisor makes himself primarily liable the promise is not within the Statute,³ and need not be in writing: Necessitates primary liability of third party

If two come to a shop, and one buys, and the other, to gain him credit, promises the seller '*If he does not pay you, I will*', this is a collateral undertaking, and void⁴ without writing, by the Statute of Frauds: but if he says, '*Let him have the goods, I will be your paymaster*', or '*I will see you*

¹ [1894] 2 Q.B. 885.

² At p. 896.

³ *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778.

⁴ The word 'void' is here used to mean 'unenforceable'.

paid', this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.¹

Thus in *Reader v. Kingham*² the bailiff of a County Court was about to arrest a debtor; the defendant promised to pay the debt if the bailiff would forbear to arrest the debtor. This was held to be a promise of indemnity from the defendant to the bailiff and not one of guarantee, since the debtor was under no liability to the bailiff, and the bailiff was not authorized by the creditor to make this arrangement:

But it should be noted that a promise to answer for the debt of another, where the guarantee is merely incidental to a larger contract and not the sole object of the transaction, has been held not to be within the section. So in *Sutton & Co. v. Grey*,³ where the defendants entered into an oral arrangement with a stockbroker to introduce business to him on the terms that they were to receive half the commissions earned and to pay half the losses incurred in the event of a client introduced by them failing to pay, it was held that their promise to answer for the debt of such a client did not fall within the section. It was incidental to a wider transaction and did not have to be evidenced by writing.

and a real liability The liability guaranteed may be prospective at the time the promise is made, as, for example, a promise by *A* to *X* that if *M* employs *X*, he (*A*) will go surety for payment for the services which will be rendered. Yet there must be a principal debtor at some time; else there is no suretyship, and the promise though not in writing will nevertheless be actionable. This is illustrated by *Mountstephen v. Lakeman*:⁴

The defendant was the chairman of a Local Board of Health, and the plaintiff was a builder. It was proposed that the plaintiff should construct certain drains. When asked if he had any objection to doing the work, the plaintiff replied that he had none, provided that the defendant or the Board would become responsible for payment. Whereupon the defendant said, 'Go on, Mountstephen, and do the work, and I will see you paid.' The Board repudiated liability on the ground that they had never entered into any agreement with the plaintiff. When sued, the defendant pleaded that his statement was a promise to be answerable for the debt of another within the Statute of Frauds and not being in writing was unenforceable.

¹ *Birkmyr v. Darnell* (1704), 1 Salk. 27.

² (1862), 13 C.B., N.S. 344.

³ [1894] 1 Q.B. 285.

⁴ (1871), L.R. 7 Q.B. 196, affirmed *sub nom. Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17.

The Court held that the plaintiff was entitled to succeed. The Board had incurred no liability which could be guaranteed, and there could be no suretyship unless there was a principal debtor. The words of the defendant, when properly construed indicated that he would therefore be liable, not as surety, but as sole debtor, by reason of his oral promise to the plaintiff.

If there is an existing debt for which a third party is liable to the promisee, and if the promisor undertakes to be answerable for it, still there is no guarantee if the terms of the agreement are such as to extinguish the original liability. If *A* says to *X*, 'Give *M* a receipt in full for his debt to you, and I will pay the amount', this promise would not fall within the Statute;¹ for there is no suretyship, but a substitution of one debtor for another. The promise must not effect a release of the original debtor; his liability must be a continuing liability.

The debt, default, or miscarriage spoken of in the Statute will include liabilities arising out of tort as well as out of contract. So in *Kirkham v. Marter*:²

The defendant's son wrongfully rode the plaintiff's horse without his leave and killed it. The defendant promised to pay the plaintiff a certain sum in consideration of his forbearing to sue his son. This promise was not evidenced by writing.

It was held that this was a promise to answer for the 'miscarriage' of another within the meaning of the Statute and it was accordingly unenforceable.

Contracts for the Sale of Land

The relevant portion of section 4 of the Statute of Frauds³ has been replaced by section 40 (1) of the Law of Property Act, 1925. This states:

No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

It is conceived that the decisions on the old wording of the Statute of Frauds are still applicable to this contract. The section deals with agreements made in view of leases or sales,

¹ *Goodman v. Chase* (1818), 1 B. & Ald. 297.

² (1819), 2 B. & Ald. 613.

³ 'any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them'.

but it is not always easy to say what constitutes an interest in land. Contracts which are preliminary to the acquisition of an interest, or such as deal with a remote and inappreciable interest, are outside the section. Such would be an agreement with a boarding-house keeper for board and lodging;¹ to put a house into repair for a prospective tenant;² or to transfer shares in a banking³ or waterworks⁴ company which, though it possesses land, gives no appreciable interest in the land to its shareholders.

Sale of crops The difficulties which have arisen in interpreting this section may be illustrated by reference to contracts for the sale of crops. A distinction has been drawn as to these between 'emblemments', or *fructus industriales*, that is to say, crops produced by cultivation, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*. The law now seems to be that *fructus industriales* are always goods and any agreement for their sale need not be evidenced by writing.⁵ *Fructus naturales*, on the other hand, are treated as an interest in land within the Statute unless they are to be severed from the soil before the property in them passes to the buyer,⁶ or it is agreed that they should be severed by the purchaser under the contract of sale.⁷

Formal Requirements

Requirements of form The form required is the next point to be considered. What is meant by the stipulation that 'the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised'? It has been substantially re-enacted in section 40 (1) of the Law of Property Act, 1925, and is still operative in connexion with a contract of guarantee. Many of the decisions which will be cited with reference to its interpretation were decided on portions of the Statute of Frauds which have now been repealed, but they are no less authoritative in connexion with the two classes of contract which still remain.

¹ *Wright v. Stavert* (1860), 2 E. & E. 721.

² *Angell v. Duke* (1875), L.R. 10 Q.B. 174.

³ *Humble v. Mitchell* (1839), 11 A. & E. 205.

⁴ *Bligh v. Brent* (1836), 2 Y. & C. 268.

⁵ *Duppa v. Mayo* (1669), 1 Wms. Saund. 275, at p. 276.

⁶ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 62.

⁷ *Marshall v. Green* (1875), 1 C.P.D. 35.

(a) The form is merely evidentiary

The form required does not go to the *existence* of the contract. The contract exists though it may not be clothed with the necessary form, and the effect of a failure to comply with the provisions of the Statute is simply that no action can be brought until the omission is made good. Merely evidentiary

It is not difficult to illustrate this proposition. Thus, the note in writing may be made so as to satisfy the Statute, at any time between the formation of the contract and the commencement of an action;¹ or the signature of the party charged may be affixed even before the contract is made. For instance, one party to the contract may sign a rough draft of its terms, and acknowledge his signature by way of concluding the contract when the draft has been corrected;² and an offer containing the names of the parties and the terms of an offer signed by the offerer will bind him even though the contract is only concluded by a subsequent parol acceptance.³

In fact, the memorandum need not even be a document made as a record of the contract, but may have been intended for some entirely different purpose. It may even happen that one of the parties to a contract which he has not signed may acknowledge it in a letter which supplies his signature and contains at the same time an announcement of his intention to repudiate the contract.⁴ He has then supplied the statutory evidence, and, as the contract had already been made, his repudiation was nugatory.

It seems, however, to be settled that the writing relied on as taking a case out of the Statute must be in existence before the action is brought.⁵

(b) Parties and subject-matter

The parties and the subject-matter of the contract must appear in the note or memorandum. The parties and subject-matter must appear

The parties must be named, or so described as to be identified with ease and certainty. So a letter beginning 'Sir', signed

¹ *Barkworth v. Young* (1856), 4 Drew. 1 (fourteen years).

² *Stewart v. Eddowes* (1874), L.R. 9 C.P. 311; *Koenigsblatt v. Sweet*, [1923]

2 Ch. 314.

³ *Reuss v. Picksley* (1866), L.R. 1 Ex. 342.

⁴ *Buxton v. Rust* (1872), L.R. 7 Ex. 279; *Thirkell v. Cambi*, [1919] 2 K.B. 590.

⁵ *Lucas v. Dixon* (1889), 22 Q.B.D. 357; *Farr Smith & Co. v. Messers*, [1928] 1 K.B. 397.

by the party charged but not containing the name of the person to whom it is addressed, is insufficient to satisfy the Statute;¹ but if the letter is shown to have been contained in an envelope on which the name appears, the two papers could be regarded as one document, and the requirement satisfied.² Where one of the parties is not named, but is described, oral evidence will be admitted for the purpose of identification if the description points to a specific person, but not otherwise.³ So if property is sold by an agent on behalf of the 'owner' or 'proprietor' it may be proved orally that *X* was the owner or proprietor;⁴ but if the sale was made by the agent on behalf of the 'vendor', or his 'client', or his 'friend', this description might fit any one of a number of people and there would be no such certainty of statement as would render oral evidence admissible.⁵

The same principle is applied to descriptions of the subject-matter of a contract. In *Plant v. Bourne*:⁶

The plaintiff agreed to sell and the defendant to buy 'twenty-four acres of land, freehold, and all appurtenances thereto at Totmonslow, in the parish of Draycott, in the county of Stafford'.

It was held that oral evidence could be admitted to identify the land. But a receipt for money paid by one party to another 'on account of his share in the Tividale mine' has been held to be too uncertain as to the respective rights and liabilities of the parties, to be identified by oral evidence.⁷

All the material terms of the contract must be accurately set out in the memorandum. Any material term omitted which is of benefit solely to one party may be waived by him,⁸ but if it is of benefit to the other⁹ or to both parties (such as a provision for vacant possession of land sold),¹⁰ the statutory requirements will not be satisfied. The consideration for the agreement must appear in writing where the contract is one for the sale or other disposition of land, but by the Mercantile Law Amendment Act, 1856, section 3,¹¹ the consideration need not be stated where the promise is one 'to answer for the debt, default, or miscarriage of another', i.e. contracts of guarantee.

¹ *Williams v. Jordan* (1877), 6 Ch. D. 517.

² *Pearce v. Gardner*, [1897] 1 Q.B. 688.

³ *Stokes v. Whicher*, [1920] 1 Ch. 411.

⁴ *Rossiter v. Miller* (1878), 3 App. Cas. 1124.

⁵ *Potter v. Duffield* (1874), L.R. 18 Eq. 4.

⁶ *Caddick v. Skidmore* (1857), 2 De G. & J. 52.

⁷ *North v. Loomes*, [1919] 1 Ch. 378, at p. 385.

⁸ *Burgess v. Cox*, [1951] Ch. 383.

⁹ *Hawkins v. Price*, [1947] Ch. 645.

[1897] 2 Ch. 281.

¹¹ 19 & 20 Vict., c. 97.

(c) *Several documents*

The memorandum may consist of various letters and papers, but they must be connected and complete.

It is essential that all the material terms of the contract should be in writing, but these terms need not appear in the same document; a memorandum may be proved from several papers or from a correspondence, but the connexion must appear from the papers themselves.¹ Oral evidence is therefore admissible to connect two documents, but only where the signed document either on the face of it expressly refers to the other, or impliedly assumes some other documentary transaction:²

The terms may be collected from various documents

but must be connected on the face of them

if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you can get a sufficient memorandum within the statute by reading the two together.

In *Long v. Millar*³ the plaintiff had signed a document containing all the terms of the purchase. The only document signed by the defendant was a receipt for the deposit. The Court of Appeal read the receipt as referring to a deposit on an agreement to purchase land, and admitted oral evidence to connect the two documents. Where, however, there is no such express or implied reference, the statutory requirements will not be fulfilled.⁴

(d) *Signature*

The memorandum must be signed by the party to be charged therewith or by some other person thereunto by him lawfully authorized.

Signature of party or agent

The memorandum need not be signed by both parties, and a party who has not signed it is able to enforce it against the party who has.⁵ The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle.

These rules are established by a number of cases turning

¹ *Stokes v. Whicher*, [1920] 1 Ch. 411.

² *Ibid.*, per Russell J. at p. 418.

³ (1879), 4 C.P.D. 450.

⁴ *Boydell v. Drummond* (1809), 11 East 142.

⁵ *Boys v. Ayerst* (1822), 6 Madd. 316.

upon difficult questions of evidence and construction,¹ and a further discussion of them would be out of place here.

(e) *Non-compliance*

Failure to
comply

It remains to consider what is the position of parties who have entered into a contract required to be evidenced by writing, but who have not complied with the statutory provisions. Such a contract is not void, or voidable, but it cannot be enforced by action against a party who has not signed a memorandum because it is incapable of proof.² On the other hand, a party who has not signed a memorandum can enforce the contract against one who has.³ As an oral contract is merely unenforceable by action, and not void *ab initio*, a vendor of land who has received a deposit from a purchaser under such a contract may forfeit the deposit if the purchaser defaults;⁴ he is not seeking to enforce the contract by action, but to exercise his rights under a valid and subsisting contract.

Part Performance

Part per-
formance

Under the equitable doctrine of Part Performance the Courts will in certain cases allow a contract, even though of a kind required to be proved by writing, to be proved by oral evidence, when the party seeking to enforce the contract has done acts in performance of his obligations under it. The doctrine, however, is strictly limited, and the conditions of its application are stated in a passage in Fry on Specific Performance,⁵ which has been judicially approved,⁶ as follows:

In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: first, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance.

We will consider each of these conditions in turn.

¹ See *Leeman v. Stocks*, [1951] Ch. 941.

² *Maddison v. Alderson* (1883), 8 App. Cas. 467, at p. 488.

³ *Boys v. Ayerst* (1822), 6 Madd. 316.

⁴ *Monnickendam v. Leanse* (1923), 39 T.L.R. 445. ⁵ (6th ed.), § 580.

⁶ *Chapronière v. Lambert*, [1917] 2 Ch. 356, at p. 361; *Rawlinson v. Ames*, [1925] 1 Ch. 96, at p. 114.

(a) *Performance referable to the contract*

The acts of performance relied upon must of themselves suggest the existence of a contract such as it is desired to prove, although they need not establish the exact terms of that contract. For example, in an old case: *Lester v. Foxcroft*,¹ when the plaintiff, in pursuance of an oral agreement for a lease, had entered upon the land of the defendants' testator, pulled down existing buildings and built new houses on the site, the House of Lords ordered the defendants to execute the lease. And in *Rawlinson v. Ames*:²

Must
suggest
existence
of contract

The defendant entered into an oral contract with the plaintiff to take the lease of a flat. It was agreed that certain alterations should be carried out by the plaintiff, and, while these were being carried out, the defendant (a woman) thought fit constantly to inspect their progress and to make suggestions about the work. On completion of the alterations, she repudiated the contract and set up the defence that there was no sufficient note or memorandum in writing.

It was held that the acts of the plaintiff, in complying with the requests of the defendant, inevitably suggested the conclusion that the defendant had entered into a contract giving her some interest in the property. They were consequently acts of part performance sufficient to let in oral evidence of the agreement for a lease. The reason for this requirement that the acts must refer to the contract is that the equitable doctrine does no more than allow an alternative to the statutory memorandum; the memorandum is required as evidence of the contract, and equity requires the acts relied upon as part performance to fulfil the same function.

Conversely, acts of performance which do not of themselves involve any inference of the existence of a contract will not bring the doctrine into play. In the leading case of *Maddison v. Alderson*³ the whole doctrine was exhaustively discussed by the House of Lords:

or doctrine
excluded

The appellant had served as housekeeper to one Alderson for many years without wages, and she alleged that she had done so in consideration of his oral promise to make a will leaving her a certain farmhouse for life. Alderson died intestate, having made a will in her favour but having omitted to get it properly attested. The appellant possessed herself of the title deeds to the property, and Alderson's heir-at-law brought an action to recover them.

¹ (1701), Colles, P.C. 108.

² [1925] 1 Ch. 96.

³ (1883), 8 App. Cas. 467.

It was held by the House of Lords that since the appellant's continuance in Alderson's service was easily explicable without supposing any contract relating to Alderson's land, it was not an act which would take the alleged contract out of the statute. For the same reason it is well settled that the payment of a sum of money, either as purchase money, or as rent in advance, is not a sufficient act of part performance, for 'the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land'.¹ On the other hand, 'the fact that an ingenious mind might suggest some other and improbable explanation of the facts'² is not enough to prevent acts from being necessarily referable to the contract.

(b) *Fraud on the plaintiff*

Change of
position

The acts of part performance relied upon must have been performed by the plaintiff; he cannot rely on acts done by the defendant. Further the doctrine requires that the plaintiff, by acting on the promises of the other party, must have changed his position for the worse, so as to render it unfair that the other should not be bound by the contract; there would otherwise be no 'equity' for the Court to enforce in his favour. The exclusion of a money payment from admissible acts of part performance has also been explained on this ground, for the money can be recovered back by action if the contract is not performed.³

(c) *Contract specifically enforceable*

Contract
must be
specifically
enforceable

The contract must be one which, if it were properly evidenced by writing, would have been specifically enforceable. This condition arises from the history of the doctrine, which is wholly the creation of the Courts of Equity; and although, since the Judicature Acts, it may be administered in any Court, it still has the limitations which were impressed upon it by the nature of equitable jurisdiction over contracts before the amalgamation of the Courts. Thus in *Britain v. Rossiter*:⁴

An action was brought by the plaintiff for wrongful dismissal, in breach of an oral contract of service not to be performed within the space of one year from the making thereof. This was one of the contracts which

¹ *Maddison v. Alderson* (1883), 8 App. Cas. 467, per Lord Selborne at p. 479.

² *Broughton v. Snook*, [1938] 1 Ch. 505, per Farwell J. at p. 515.

³ *Chapronière v. Lambert*, [1917] 2 Ch. 356.

⁴ (1882), 11 Q.B.D. 123.

the Statute of Frauds formerly required to be proved by written evidence. The contract had been performed in part, and the doctrine of part performance was invoked to dispense with the need for writing.

The Court of Appeal held, however, that the doctrine did not apply, since Courts of Equity would not specifically enforce a contract of service.¹ This limitation is important, for it means that the doctrine is now confined to those contracts caught by section 40 (1) of the Law of Property Act, 1925, since equity would never specifically enforce a contract of guarantee.

(d) *Proper evidence of the contract*

There must be clear and proper evidence, whether oral or written, of the terms of the contract, for the doctrine cannot be used to transform into a valid contract one which would otherwise fail for uncertainty. Proper evidence

The justification for the doctrine of part performance has been stated to be that 'Equity will not permit a statute to be made an instrument of fraud'; but Courts of Equity are no more able than Courts of Law to overrule a Statute because it may lead to results which are contrary to conscience. A better explanation would seem to be that the role of equity is supplementary to the Statute, so that 'the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not . . . upon the contract itself'.² Such acts will be held to be as good evidence as any note or memorandum in writing and will be collateral to the contract in question. How reconciled with statute

III. CONSIDERATION

It has already been stated that consideration is a universal Consideration defined
✓requisite of contracts not under seal. It will be well, therefore, to start with a definition of consideration; and we may take that which is given by Lush J. in the case of *Currie v. Misa*:³

A valuable consideration in the sense of the law may consist in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.

Consideration is something done, ✓forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in

¹ *Infra*, ch. xvii.

² *Maddison v. Alderson* (1883), 8 App. Cas. 467, per Lord Selborne at p. 475.

³ *Currie v. Misa* (1875), L.R. 10 Ex. 153, at p. 162.

respect of the promise of the other party. It is, as one learned writer has succinctly stated,¹ the price for which the promise of the other is bought.

Given in
respect of
promise

The consideration must necessarily be given in respect of the promise, and it is usually, although not invariably,² given at the request of the promisor. A benefit conferred or a detriment suffered otherwise than in respect of, or in return for, the promise of the other party can, therefore, never constitute consideration, and this point received a rather curious illustration in the case of *Wigan v. English and Scottish Law Life Assurance Association*:³

One Hackblock had insured his life with the defendant company by a policy which was to be void 'if the life assured died by his own hands', but this condition was not to prejudice 'the *bona fide* interests of third parties based on valuable consideration'. Hackblock, being pressed by Wigan for the payment of a debt, executed a mortgage of the policy to Wigan, but left it with his solicitors, who succeeded in getting further time for the payment of the debt without using or even mentioning the mortgage. Subsequently, at Hackblock's request, they destroyed the mortgage, and it was only brought to the knowledge of the plaintiffs, the executors of Wigan, after Hackblock's death. Hackblock committed suicide. The plaintiffs then claimed the policy moneys from the insurance company.

Parker J. held that Wigan had not given consideration for the interest, if any, which he had acquired in the policy by virtue of the mortgage. The mere fact that there was in existence at the time of the mortgage a debt from Hackblock to Wigan and that Wigan had forborne to sue for payment did not mean that consideration had been given. The security had never been communicated to the promisor, and so the forbearance could not be said to be in respect of the promise. Again, in *Combe v. Combe*,⁴ where a husband, upon divorce, promised his wife a permanent allowance of £100 a year, the Court of Appeal refused to hold that a consequent forbearance on the part of the wife to apply for maintenance amounted to consideration. The husband had not requested her to forbear, and her action could not be said to have been in return for his promise to pay.

¹ Pollock, *Principles of Contract* (13th ed.), p. 133.

² (1951), 67 L.Q.R. 456, where Professor Goodhart effectively demonstrates that a request is not essential to a binding obligation provided that the consideration is referable to the promise. Cf. Smith (1953), 69 L.Q.R. 99.

³ [1909] 1 Ch. 291.

⁴ [1951] 2 K.B. 215.

Necessity for Consideration

Consideration is necessary for the formation of every simple contract; an informal promise made without consideration is not actionable in English law even though the promisee may have acted upon it to his detriment.¹

Necessity
in simple
contracts

As we have seen, from the very beginning of the action of Assumpsit, a plaintiff who could not produce a specialty had to show that he had contributed to the bargain by furnishing a valuable consideration of some kind. In 1756, however, Lord Mansfield became Chief Justice of King's Bench, and the doctrine of consideration was attacked by him in two fundamental respects. In the first place, he asserted that consideration was only evidentiary; secondly, that the existence of a previous moral obligation was sufficient to support an express, but gratuitous, promise.

The case of *Pillans v. Van Mierop*² illustrates the first of these assertions. The plaintiff sued the defendant on a written promise to accept a bill of exchange. Lord Mansfield held that consideration was only one of several modes of supplying evidence of the promisor's intention to bind himself; and that if the terms of a contract were reduced to writing by reason of commercial custom, or in obedience to statutory requirement, such evidence dispensed with the need for consideration. The question arose again in 1778 in *Rann v. Hughes*:³

Written
promise

Mrs. Hughes, administratrix of an estate, promised in writing to pay, out of her own pocket, money which was due from the estate to the plaintiff. There was no consideration for the promise, and it was contended that the observance of the form then required by the Statute of Frauds (a written note or memorandum) made consideration unnecessary.

The case went to the House of Lords.* The opinion of the judges was taken, and Lord Mansfield's proposal was overruled, Skynner C.B. saying:⁴

It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such an agreement is 'nudum pactum ex quo non oritur actio'; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only

¹ In the United States, however, a promise intended to be acted upon and in fact acted upon, may be enforceable. Some would have it that way here also. See Denning (1952), 15 Mod. L.R. 1.

² (1765), 3 Burr. 1663.

³ (1778), 7 T.R. 350.

⁴ *Nota*, p. 350.

that it is to be understood in our law. . . . All contracts are by the law of England divided into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved.

Had Lord Mansfield succeeded, the English law might well have been assimilated to that of Scotland where consideration is not a necessary requirement, but is relevant only to the way an obligation may be proved.

Moral obligation It was not long, however, before Lord Mansfield and his colleagues returned to the attack—this time with more success. They held that a moral obligation was sufficient consideration for an actual promise. In *Lee v. Muggeridge*,¹ for example, in 1813, the new doctrine is seen to be well entrenched, for there it was said,² 'It has been long established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action.' Nevertheless this doctrine, after it had undergone some criticism from Lord Tenterden,³ was finally rejected by the Exchequer Chamber in *Eastwood v. Kenyon*:⁴

Eastwood had been guardian and agent of Mrs. Kenyon while she was an infant, and had incurred expenses in the improvement of her property: he did this voluntarily, and, in order to do so, was compelled to borrow money, for which he gave a promissory note. When the infant came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise he was sued.

The moral obligation to fulfil such a promise was insisted on by the plaintiff's counsel, but was held to be insufficient where the consideration was wholly past. 'Indeed', said Lord Denman⁵ in delivering judgment, 'the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.'

Thus was finally overthrown the doctrine formulated by Lord Mansfield, that consideration was only one of various modes by which it could be proved that parties intended to contract: a doctrine which, in spite of the decision in *Rann v. Hughes*,⁶ survived in the theory that the existence of a moral

¹ (1813), 5 Taunt. 36.

² *Ibid.*, at p. 46 *per* Mansfield C.J. (who was Chief Justice of Common Pleas).

³ *Littlefield v. Shee* (1831), 2 B. & Ad. 811.

⁴ (1840), 11 A. & E. 438.

⁵ At p. 450.

⁶ (1778), 7 Term R. 350 (n).

obligation was evidence that a promise was intended to be binding. From this time onwards, we get a rule of universal application, a uniform test of the actionability of every promise made by parol. In each case we must ask, Does the promisor get any benefit or the promisee sustain any detriment, present or future, in respect of the promise? If not, the promise is gratuitous, and is not binding. In working out this doctrine to its logical results it has, no doubt, happened from time to time that the Courts have been compelled to hold a promise to be invalid which the parties intended to be binding, or that the slightness of the benefit or detriment which may constitute a consideration has tended to bring the requirement into ridicule. The doctrine has therefore been the subject of considerable criticism¹ but it is advisable to reserve a discussion of this until later, and to proceed now to examine the general rules governing the application of consideration to contracts.

Consideration must not be past

We must first deal with the relation of the consideration to the promise in respect of time. A consideration may be *executory*, a promise given for a promise; or it may be *executed*, an act or forbearance given for a promise; but it must not be *past*, for in that case it is a mere sentiment of gratitude or honour prompting a return for benefits received—in other words, it is no consideration at all.

An *executory* consideration consists of a promise to do, forbear, or suffer, given in return for a like promise. Thus mutual promises to marry, or a promise to do work in return for a promise of payment, are illustrations of executory considerations. The fact that the promise given for a promise may be dependent upon a condition does not affect its validity as consideration. *A* promises *B* to do a piece of work for which *B* promises to pay if the workmanship is approved by a third party. The promise of *B* is consideration for the promise of *A*.

A contract arises upon a present or *executed* consideration when one of the two parties has, either in the act which constitutes an offer or the act which constitutes an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only. The case of an act which constitutes an offer may be illustrated by the example of a man who offers his labour or goods under such circumstances that

¹ See the Sixth Interim Report of the Law Revision Committee (1937). Cmd. 5449, discussed *infra*, p. 107.

he obviously expects to be paid for them; the contract arises when the labour or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them. So if a wine merchant sends to a customer a selection of wines, and the customer retains some and returns the rest, he will be bound to pay for those retained, since the tender of the wine will be at once the offer and the consideration for the obligation.¹ On the other hand, a contract for which the consideration is the act which constitutes an acceptance is best illustrated by the case of an advertisement of a reward for services, which becomes a binding promise when the service is rendered. In such cases it is not the offeror, but the acceptor, who has done his part at the moment when he enters into the contract. If *A* makes a general offer of reward for information and *B* supplies the information, *A*'s offer is turned into a binding promise by the act of *B*, and *B* simultaneously concludes the contract and furnishes consideration by performance.²

This form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail risk or expense. The request for such services embodies or implies a promise, which becomes binding when liabilities or expenses are incurred. In *Brittain v. Lloyd*³ a lady employed an auctioneer to sell her estate; he was compelled in the course of the proceedings to pay certain duties to the Crown, and it was held that the fact of employment implied a promise to indemnify for money paid in the course of the employment. 'Whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference.'⁴ In either case the consideration is executed, and consists of the act of payment by the promisee.

but not
past It remains to distinguish *executed* from *past* consideration. In the case of executed consideration, both the promise and the act which constitutes the consideration are integral and correlated parts of the same transaction; but in the case of past consideration the promise is subsequent to the act and independent of it. Thus if *A* saves *B* from drowning, and *B* later promises *A* a reward, *A* cannot rely on his action as considera-

¹ *Hart v. Mills* (1846), 15 M. & W. 85.

² *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; *supra*, p. 44.

³ (1845), 14 M. & W. 762.

⁴ *Ibid.*, *per* Pollock C.B. at p. 773.

tion for *B*'s promise for it is past in point of time. A past consideration is, in effect, no consideration at all; that is to say it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise. It is merely an act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration. In *Roscorla v. Thomas*¹ this principle was clearly stated:

The plaintiff purchased a horse from the defendant, who afterwards, in consideration of the previous sale, warranted that the horse was sound and free from vice. It was in fact a vicious horse.

The Court held that the sale itself created no implied warranty that the horse was not vicious. The warranty had therefore to be regarded as independent of the sale and as an express promise based upon a previous transaction. It fell, therefore, within the general rule that a consideration past and executed will support no other promise than such as would be implied by law.

To the general rule thus laid down certain exceptions may be said to exist:

(a) *Request of the promisor*

A past consideration will, it has been said, support a subsequent promise, if the consideration was given at the request of the promisor. In the old case of *Lampleigh v. Braithwait*:²

Consideration moved by previous request

The defendant requested the plaintiff to obtain for him a free pardon from the King. The plaintiff incurred certain expenses as the result of his efforts to do this, and the defendant subsequently promised to pay him £120 for his trouble. The plaintiff now sued for this sum.

It was clear that the consideration for the promise was past, but the Court agreed:³

that a mere voluntary courtesy will not have a consideration to uphold an *Assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *Assumpsit*, it will bind for the promise though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.

¹ (1842), 3 Q.B. 234; *Re McArdle*, [1951] 1 Ch. 669.

² (1615), Hob. 105.

³ At p. 106.

The case was decided in the year 1615, and for some time before and after that decision, cases are to be found which, more or less definitely, support the exception as stated above.

In the nineteenth century, however, with the rejection of Lord Mansfield's heresy that a previous moral obligation might be good consideration,¹ the rule began to be looked at in a fresh light. In *Kennedy v. Broun*,² in 1863, Erle C.J. explained *Lampleigh v. Braithwait* rather differently and indicated that a past service performed at the request of the promisor will only amount to consideration if it was assumed at the time that the service was ultimately to be paid for.

It was assumed [he says³] that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably, at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount.

This would also seem to be the *ratio decidendi* of *Wilkinson v. Oliveira*,⁴ where the plaintiff at the defendant's request gave him a letter for the purposes of a lawsuit. The letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1,000. Here the plaintiff evidently expected some return for the use of the letter, and the defendant's request for it was, in fact, an offer that if the plaintiff would give him the letter he would pay a sum to be fixed later.

Regarded from this point of view the rule which we are discussing is no departure from the general doctrine as to past consideration. When a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum may be regarded as a part of the same transaction,⁵ or else as evidence to assist the Court in determining what would be a reasonable sum.

¹ *Supra*, p. 80.

² (1863), 13 C.B., N.S. 677.

³ At p. 740.

⁴ (1835), 1 Bing. N.C. 490. See also *Re Casey's Patents*, *Stewart v. Casey*, [1892] 1 Ch. 104.

⁵ *Stewart v. Casey*, [1892] 1 Ch. 104, per Bowen L.J. at p. 115.

(b) A debt precedent

It has long been decided that the existence of a precedent ^{Debts} debt is sufficient consideration for a subsequent promise to pay that debt.¹ If, therefore, the debt is barred by the passage of time under the Limitation Act, 1939,² an acknowledgement by the debtor can be sued on by the creditor even though the consideration for the acknowledgement might seem to be past.³ It should not be supposed, however, that the existence of a debt from *A* to *B* will always be a good consideration for any subsequent promise which *A* may make. There must be present consideration in the form of a forbearance to sue, or else, if a security is given by the debtor, it must be communicated to the promisee and induce such a forbearance.⁴

(c) Negotiable instruments

By section 27 (1) of the Bills of Exchange Act, 1882,⁵ a ^{Bills of exchange} valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. So if *A*, whose account at the bank is overdrawn, pays into that account a cheque drawn by a stranger, the bank becomes a holder for value of the cheque, as the antecedent debt of *A* is good consideration for the instrument.⁶ This is a genuine exception to the rule.

(d) Reward for services

It is sometimes said that 'where the plaintiff voluntarily does ^{Recompense} that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises to recompense him for his trouble',⁷ he will be bound by such a promise. But the authority for this proposition is slight; the decisions seem to assume that a moral obligation is sufficient consideration;⁸ and they are better explained either as cases of contract implied by the acts of the parties—a liability which clearly does not need a subsequent promise to create it, or of a quasi-contractual obligation, in which case no question of consideration would arise.⁹

¹ *Slade's Case* (1602), 4 Co. Rep. 91a; *supra*, p. 16.

² 2 & 3 Geo. VI, c. 21; *infra*, p. 491.

³ *Ss.* 23-25.

⁴ *Wigan v. English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291; *supra*, p. 78.

⁵ 45 & 46 Vict., c. 61.

⁶ But see *Oliver v. Davis*, [1949] 2 K.B. 727.

⁷ *Watson v. Turner* (1767), Buller N.P. p. 147.

⁸ *Wing v. Mill* (1817), 1 B. & Ald. 104; *Paynter v. Williams* (1833), 1 C. & M. 810.

⁹ *Viz. infra*, ch. xxi.

Consideration must move from the Promisee

Consideration must be furnished by promisee This means that a party who wishes to enforce a contract must be able to show that he himself has furnished consideration for the promise of the other party. It is not, however, necessary that it should have been intended to benefit the other party. So it need not move to the promisor.

Distinguished from privity This rule must be distinguished from another rule, namely, the doctrine of *privity of contract*, with which it is often confused. As we shall see in a later chapter,¹ it is a general rule of English law that a contract cannot confer any rights on one who is not a party to the contract, even though the very object of the contract may have been to benefit him. As promisee, he is unable to sue because there is no privity of contract between him and the promisor. This inability of one who is not a party to the contract to acquire rights under it follows from the view which our law has adopted as to the operation of contract generally: it has no particular connexion with the doctrine of consideration. Nevertheless, an additional reason for refusing him an action would be that, as promisee, he has normally furnished no consideration.² Thus in *Tweddle v. Atkinson*:³

M and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, that each should pay a sum of money to *M*, and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him.

It was held that no action would lie. No consideration had moved from *M*, the promisee, and so the promise was, as far as he was concerned, a gratuitous one.

But the rules of privity and of consideration are not always thus coincident. If, for example, *A*, *B*, and *C* enter into a contract under which *A* promises both *B* and *C* that if *B* will dig *A*'s garden, he, *A*, will give £10 to *C*, *B* of course can compel *A* to pay the money to *C*, but *C* cannot compel him to pay the money to himself. Although he is a party to the contract, he is a stranger to the consideration.⁴ The rule that considera-

¹ *Infra*, p. 341.

² *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A.C. 847, at p. 855; *infra*, p. 349.

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⁴ The Law Revision Committee, in recommending the abolition of this rule, pertinently remark: 'We can see no reason of logic or of public policy why *A*, who has got what he wanted from *B* in exchange for his promise, should not be compelled by *C* to carry out that promise merely because *C*, a party to the contract, did not furnish the consideration' (Cmd. 5449, p. 22).

tion must move from the promisee is thus distinct from that of privity of contract. It is not enough that consideration should have been given; it must have been given by the promisee.

There are, however, a number of exceptions to this rule. In the case of negotiable instruments, for example, it is not necessary that the person seeking to enforce the instrument should himself have furnished consideration, provided that consideration has at some time during the history of the instrument been given.¹ Trusts constitute another major exception, and other instances where the rule need not be observed will be found in the chapter on privity of contract in this book.²

Consideration need not be adequate

Consideration need not be adequate to the promise, but it must be of some value in the eyes of the law. The Courts will not make bargains for the parties to a suit and, if a man gets what he contracted for, will not inquire whether it was an equivalent to the promise which he gave in return. The consideration may be of benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee; in any case 'its adequacy is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced'.³ The most trifling detriment or charge will suffice, and the following cases will illustrate the rule:

In Bainbridge v. Firmstone:⁴

Bainbridge owned two boilers, and at the request of Firmstone allowed him to weigh them on the terms that they were restored in as good a condition as they were lent. Firmstone took the boilers to pieces in order to weigh them and returned them in this state, and for breach of this promise Bainbridge sued him.

Firmstone was held liable. 'The consideration', said Patteson J.,⁵ 'is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.'

¹ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 27 (2).

² *Infra*, p. 341.

³ *Bolton v. Madden* (1873), L.R. 9 Q.B. 55, *per* Blackburn J. at p. 57.

⁴ (1838), 8 A. & E. 743.

⁵ At p. 744.

Adequacy
of con-
sideration

Illustra-
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⁴ (1838), 8 A. & E. 743.

⁵ At p. 744.

In *Haigh v. Brooks*,¹ the consideration of a promise to pay certain bills was the surrender of a document supposed to be a guarantee, which turned out to be unenforceable. The worthlessness of the document surrendered was held to be no defence to an action on the promise. 'The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise.'²

In *De la Bere v. Pearson*:³

The defendants advertised in their paper, offering to give advice with reference to investments. The plaintiff, accepting the offer, wrote for advice, and asked for the name of a good stockbroker. The questions and answers were, if the defendants chose, to be inserted in their paper as published. The defendants recommended a broker who was, in fact, an undischarged bankrupt. Sums of money sent by the plaintiff to the broker as a result of this recommendation were misappropriated by him and lost. The plaintiff now sought to recover these sums from the defendants.

The Court held that the publication of letters might obviously have a tendency to increase the sale of the defendant's paper, and that the offer, when accepted, resulted in a contract for good consideration.

In the Roman law of Sale, and in certain continental systems, the price had to be a fair and serious one, and if this was not so, the seller could rescind the contract unless the buyer was willing to come up to the fair price. This doctrine of *laesio enormis* forms no part of the English common law. In equity, however, inadequacy of consideration is treated as affording corroborative evidence of fraud or undue influence, such as may enable a promisor to resist a suit for specific performance, or to get his promise cancelled.⁴ But mere inadequacy of consideration, unless, in the words of Lord Eldon, it is 'such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud',⁵ is not of itself a ground on which specific performance of a contract will be refused.

Consideration must be real

Reality of
consideration

Though consideration need not be adequate, it must be real. It must be 'something of some value in the eye of the law'. We

¹ (1839), 10 A. & E. 309; affirmed *sub nom. Brooks v. Haigh* (1840), 10 A. & E. 323, where it was said that the delivery of the paper alone would suffice.

² *Ibid.*, per Lord Denman C.J. at p. 320.

³ [1908] 1 K.B. 280.

⁴ *Infra*, p. 236.

⁵ *Coles v. Trecothick* (1804), 9 Ves. Jun. 234, at p. 246.

should now examine those cases where the reality of consideration has been questioned or defined.

(a) *Motive and consideration*

Motive must be distinguished from consideration. In *Motive Thomas v. Thomas*:¹

A widow sued her husband's executor for breach of an agreement to allow her to occupy a house (which had been the property of her husband) on payment of a small ground rent of £1 *per annum*. The executor, in making the agreement, was carrying out a wish of the deceased that his wife should have the use of the house.

The Court held that the desire to carry out the wishes of the deceased would not amount to a consideration. 'Motive is not the same thing with consideration. Consideration means something of some value in the eye of the law, moving from the plaintiff.'² But it was further held that the undertaking by the plaintiff to pay ground rent was a consideration for the defendant's promise, and that the agreement was binding.

The confusion of motive and consideration has appeared in other ways. The distinction between *good* and *valuable* consideration, or family affection as opposed to money value, is only to be found in the history of the law of real property. Motive has often figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable, for our purpose, from a desire on the part of an executor to carry out the wishes of a deceased friend,³ or a desire on the part of a father to pay the debts of his son.⁴ The mere satisfaction of such a desire unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law.

It has already been noted that, at the end of the eighteenth and beginning of the nineteenth century, the moral obligation to make a return for past benefit had obtained currency in judicial language as an equivalent to consideration. But past consideration is no consideration, and what the promisor gets in such a case is the satisfaction of motives of pride or gratitude. The question was settled once and for all in *Eastwood v. Kenyon*,⁵

¹ (1842), 2 Q.B. 851.

² *Ibid.*, per Patteson J. at p. 859.

³ *Thomas v. Thomas*, *supra*.

⁴ *Mortimore v. Wright* (1840), 6 M. & W. 482.

⁵ (1840), 11 A. & E. 438; *supra*, p. 80.

and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation resting on the promisor.

(b) *Impossibility and uncertainty*

Impossibility We now come to the class of cases in which the consideration turns out to be of no ascertainable value.

physical Impossibility, either physical or legal, which exists at the time of formation of the contract and is obvious upon the face of it, makes the consideration unreal. The impossibility must be obvious, such as is, 'according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted'.¹ Thus a promise to pay money in consideration of a promise to discover treasure by magic, to go round the world in one hour, or to supply the promisor with a live pterodactyl, would be void for unreality in the consideration furnished. And an old case furnishes us with an instance of a **or legal** legal impossibility: *Harvey v. Gibbons*,² where a bailiff was promised £40 in consideration of a promise made by him that he would release a debt due to his master. The Court held that a bailiff could not sue; that the consideration furnished by him was 'illegal', for the servant cannot release a debt due to his master. By 'illegal' it is plain that the Court meant legally impossible.

We must distinguish, however, from such cases as these cases in which, though the impossibility exists at the time the contract is formed, it is not obvious on the face of it and only becomes apparent later, and also cases in which the performance of a promise, not originally impossible, becomes so by supervening events. In the first of these cases the contract may be void, or voidable, for mistake;³ in the second it may be discharged by subsequent impossibility.⁴

Uncertainty A promise which purports to be a consideration may be of too vague and unsubstantial a character to be enforced. Thus in *White v. Bluet*:⁵

A son gave a promissory note to his father; the father's executors sued him on the note, and he alleged that his father had promised to discharge him from liability in consideration of a promise on his part that he would cease from complaining, as he had been used to do, that he had not enjoyed as many advantages as his brothers.

¹ *Clifford v. Watts* (1870), L.R. 5 C.P. 577, *per* Brett J. at p. 588.

² (1675), 2 Lev. 161.

⁴ *Infra*, p. 426.

³ *Infra*, p. 240.

⁵ (1853), 23 L.J. Ex. 36.

It was said that the son's promise was no more than a promise 'not to bore his father', and was too vague to form a consideration for the father's promise to waive his rights on the note. So, too, promises to pay such remuneration 'as shall be deemed right',¹ to retire from the practice of a trade 'so far as the law allows',² have been held to throw upon the courts a responsibility which they were not prepared to assume. But this matter has already been referred to in connexion with offers held to be incapable of creating legal relations.³

(c) *Forbearance and compromise*

A forbearance to sue, even for a short time, may be consideration for a promise, although there is no waiver or compromise of the right of action. In the *Alliance Bank, Ltd. v. Broom*:⁴

The defendants, Messrs. Broom, were asked to give security for moneys owing by them to the bank. They promised to assign the documents of title to certain goods; they failed to do so, and the bank sued for specific performance of the promise.

The Court held that they were entitled to their decree:

Although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance.⁵

To use the expression adopted by the Court in a similar case, the promise to give security 'stayed the hand of the creditor'.

But in order that the forbearance should be a consideration, some liability must be shown to exist, or to be reasonably supposed to exist, by the parties. If the claim is not only invalid, but is known by the party forbearing to be so, it is not a good consideration.⁶ Also where the claim arises out of an illegal agreement, such as a wagering contract, a forbearance to sue on that claim is not sufficient consideration whether or not it is believed to be valid by the promisee.⁷

The compromise of a suit furnishes consideration of the same character. In the case of forbearance the offer may be put thus: 'I admit your claim but will do or promise something if you

¹ *Taylor v. Brewer* (1813), 1 M. & S. 290.

² *Davies v. Davies* (1887), 36 Ch. D. 359.

⁴ (1864), 2 D. & S. 289.

⁶ *Wade v. Simeon* (1846), 2 C.B. 548.

⁷ *Poteliakhoff v. Teakle*, [1938] 2 K.B. 816; *Hill v. Hill (William) (Park Lane), Ltd.*, [1949] A.C. 530; *infra*, p. 284.

³ *Supra*, p. 23.

⁵ *At p.* 292.

Forbear-
ance to sue

Com-
promise
of a suit

will stay your hand.' In the case of a compromise the offer is, 'I do not admit your claim' (or 'defence' as the case may be), 'but I will do or promise something if you will abandon it.' It has, however, been argued that if the claim is of an unsubstantial character the consideration fails. The answer is to be found in the judgment of Cockburn C.J. in *Callisher v. Bischoffsheim*:¹

Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bonâ fide* believes that he has a fair chance of succeeding, he has a reasonable ground for suing, and his forbearance to sue will constitute good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent.

In that case, the defendant agreed to deliver to the plaintiff certain securities in consideration that the plaintiff would cease to press a claim against the Honduras Government. The claim was worthless, but there was no evidence that the plaintiff knew this. It was held that there was a good consideration for the agreement. If, however, the party charged had had no case, and known that he had none, the Court would have been bound to decide the contrary.

As in the case of forbearance, the compromise of a claim arising out of an illegal contract is insufficient as consideration, whether or not the illegality is known to the promisor.

Performance of an Existing Duty

Existing duty Does the promisee do, forbear, suffer, or promise more than that to which he is legally bound? If the promisor gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. This may occur where the promisee is already under an existing duty to do that which he promises to do. But in this connexion the law draws a distinction between the performance of a public duty or one owed to the promisor, and the performance of existing duty to a third party. In the former case there will be no consideration for the promise; in the latter the law holds that a valuable consideration is present.²

(1870), L.R. 5 Q.B. 449, at p. 452.

See Davis (1937), 6 Camb. L.J. 203.

(a) Performance of a public duty

Where the promisee is already under an existing public duty, an express promise to perform, or performance of, that duty will not amount to consideration. There will be no detriment to the promisee or benefit to the promisor over and above their existing rights and liabilities.¹ In *Collins v. Godefroy*:²

The plaintiff received a subpoena to appear at a trial as a witness on behalf of the defendant. The defendant promised him a sum of money for his trouble. A person who receives a subpoena is bound to attend and give evidence.

It was held that there was no consideration for the promise, the plaintiff being under a public duty to attend.

But if the promisee undertakes to do more than that to which he is legally bound, this may be a good consideration, even though it is an act of the same kind as that which he is legally bound to do. So where a police constable, who sued for a reward offered for the supply of information leading to a conviction of a felon, had rendered services outside the scope of his ordinary duties, he was held entitled to recover;³ and a police authority which sued for the sum of £2,200 promised to them by a colliery company for whose mine they had provided a special guard during a strike, were able to maintain an action on the promise.⁴

(b) Performance of duty owed to the promisor

On the same reasoning, we find unreasonableness of consideration where the promisee undertakes to fulfil the conditions of an existing contract with the promisor. This is illustrated by the old case of *Stilk v. Myrick*:⁵

In the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that, if they would work the vessel home, the wages of the two deserters should be divided amongst them.

The promise was held not to be binding.

The agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained

¹ Unless we say, with Professor Corbin (*Contracts*, § 172), that 'a bird in the hand is worth much more than a bird in the bush'.

² (1831), 1 B. & Ad. 950.

³ *England v. Davidson* (1840), 11 A. & E. 856.

⁴ *Glasbrook Brothers, Ltd. v. Glamorgan County Council*, [1925] A.C. 270.

⁵ (1809), 2 Camp. 317.

with the ship. Before they sailed from *London* they had undertaken to do all they could under all emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port.¹

But the decision would have been otherwise if un contemplated risks had arisen.² There is an implied condition in the contract into which seamen usually enter that the ship should be seaworthy. So where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his agreement was held to be binding.³

(c) *Performance of a duty owed to a third party*

to a third party It is not difficult to see that consideration is unreal if it consists in a promise given to perform a public duty, or to perform a contract already made with the promisor. It is harder to answer the question whether performance or a promise to perform an existing contract with a third party is a real consideration.⁴

Illustrations We must note two cases dealing with this form of consideration. The first is *Shadwell v. Shadwell*:⁵

An uncle wrote to the plaintiff, his nephew, who was engaged to be married, as follows: 'I am glad to hear of your intended marriage with X; and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life or until your annual income derived from your profession as a Chancery barrister shall amount to six hundred guineas.' The plaintiff married X. He never earned as much as six hundred guineas. The annuity fell into arrear; the uncle died, and the plaintiff sued his executors.

The Court differed as to the existence of a consideration for the uncle's promise. Erle C.J. and Keating J. inclined to regard it as the offer of a promise capable of becoming a binding contract when the marriage took place. Byles J. dissented, holding that the plaintiff had done no more than he was legally bound to do, and that his marriage was therefore no consideration for the uncle's promise.

¹ (1809), 2 Camp. 317, *per* Lord Ellenborough C.J. at p. 318.

² *Hartley v. Ponsonby* (1857), 7 E. & B. 872.

³ *Turner v. Owen* (1862), 3 F. & F. 176.

⁴ *Davis* (1937), 6 Camb. L.J. 203.

⁵ (1860), 9 C.B., N.S. 159; *De Cicco v. Schweizer* (1917), 221 N.Y. 431.

In the second, *Scotson v. Pegg*:¹

Scotson promised to deliver to a third party *X*, or to his order, a cargo of coal then on board a ship belonging to himself. *X* made an order in favour of Pegg. Pegg then made an agreement with Scotson that if Scotson would deliver the coal to him, he would in return unload and discharge the coal at a fixed rate each day from the date when the ship was ready for discharge. This he failed to do, and when sued by Scotson, pleaded that Scotson was already under contract with *X* to deliver the coal, so that he had promised no more than he was bound to perform in any case. There was therefore no consideration for his promise to unload in the manner specified.

The Court held that Pegg was liable. 'It is consistent with the declaration', said Martin B.,² 'that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship.' But Wilde B. said:³ 'If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding.'

There are certain points about these cases which are unsatisfactory. For example, it has been argued that there was no intention on the part of the uncle in *Shadwell v. Shadwell* to create a contract at all; and that *Scotson v. Pegg* involved duties more onerous than the existing obligation to deliver. But it seems reasonable to hold that they establish that the performance of an existing duty to a third party is a good consideration. Indeed, this is the interpretation which has generally been adopted. The difficulty is, of course, that the 'necessary element' of detriment to the promisee seems to be wanting: he is under no greater liability because the new contract has been made.

It has therefore been suggested by certain writers⁴ that a distinction should be drawn between cases where the consideration alleged is *executed*, i.e. by performance of an existing duty to a third party, and cases where the consideration is *executory*, consisting of a promise to perform. It is contended that the former is no consideration since it involves no detriment to the

¹ (1861), 6 H. & N. 295.

² At p. 299.

³ At p. 300.

⁴ E.g. by Sir Frederick Pollock, *Principles of Contract* (10th ed.), p. 149.

promisee, whereas the latter is sufficient because it imposes upon its maker a new and detrimental obligation by exposing him to two possible suits for the breach of the same contract.

Suppose that *A* contracts with a third party, *X*, to build a fence between their properties. *B*, a neighbour, is also interested in the idea of a fence because it will provide an additional safeguard against straying cattle. *B* promises *A* that, if he will carry out his contract with *X*, he will pay him £500.¹

If this view is correct, *B*'s promise is not enforceable at the suit of *A* since, by building the fence, *A* discharges himself of his contractual burden to *X*, and there is no detriment to him. But if *A* were to enter into an agreement with *B* and were to promise *B* that he would build the fence *in any event*, this would be a good consideration since, if *A* were to break his contract, he would now be liable to two actions for breach, one at the suit of *X*, and another at the suit of *B*. His promise to perform would be an additional charge and detriment to him.

This reasoning is not acceptable. In the first place, it is not supported by the cases cited above which both allow an executed consideration to be sufficient. Secondly, it presupposes that a promise to perform an existing duty to the third party is an enforceable burden, which is precisely the question which we are trying to answer. Thirdly, it implies that a promise is in some way more effective than performance itself, which is peculiar. It is both logically and practically unsound.

There is, in fact, very little reason why both the promise and the performance of an existing contractual duty to a third party should not be a good consideration. The promisor gets a benefit for which he bargains, something to which he was not previously entitled and which he would not otherwise have received. Although consideration is normally defined in the sense of a detriment to the promisee, there is considerable authority for holding that it may also consist of a benefit conferred on the promisor as the result of a bargain made between them. Further, there are no sound reasons of public policy, as there might be, say, in the case of the performance of an existing duty to the public in general, which would serve to justify such an exception to the rule regarding sufficiency of consideration. The conclusion is, then, that 'there is no authority for the proposition that where there has been a

¹ This example is taken from Corbin, *Contracts*, § 181, together with the surrounding discussion.

promise to one person to do a certain thing it is not possible to make a valid promise to do the same thing'.¹

(d) *Validity of the distinction*

The distinction which exists between the enforceability on the one hand of a promise to perform an existing duty to a third party, and the non-enforceability on the other of a similar promise in respect of a duty to the public generally or to the promisor, seems at first sight artificial, and has indeed been criticized as such. It is justified, not so much by any exercise of legal logic, but rather by the policy considerations involved.² It would probably be against the public interest to allow a police officer to enforce payment of a reward for carrying out his official duty, and it would certainly be a form of 'black-mail' if one party to a contract were able to hold the other to ransom by threatening breach. It may be that the law cannot at present discriminate between those promises which would fall within this category, and those which would not,³ but to hold that *all* such promises were enforceable would certainly lead to cases where improper claims would be made.

Recognition of these factors has, however, led Denning L.J. (as he then was) to 'restate' the law regarding the performance of existing duties. His general contention is that the performance of any existing duty is a good consideration, provided that it is not contrary to public policy. In *Ward v. Byham*:⁴

The father of an illegitimate child wrote to the mother, from whom he was separated, promising to pay her £1 a week if the child was well looked after and happy. The child went to live with the mother. When she married another man, the father stopped the payments.

It was argued on behalf of the father that there was no consideration for the promise, as the mother was only performing her statutory duty to maintain the child. Morris and Parker L.JJ. held that the mother had promised more than her statutory duty; for example, she had undertaken that the child should not only be maintained, but happy. There was

¹ *Scotson v. Pegg* (1861), 6 H. & N. 295, *per* Wilde B. at p. 301.

² (1956), 72 L.Q.R. 490; Corbin, *Contracts*, ch. 7.

³ The American *Restatement*, however, provides in § 76 (a) that 'Any consideration that is not a promise is sufficient . . . except the following (a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts and crimes, is owed to any person'.

⁴ [1956] 1 W.L.R. 496.

therefore a consideration for the promise. But Denning L.J. approached the case on the footing that the mother was only doing that which she was already bound to do. Nevertheless, he held that there was a consideration present:¹

I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given.

And in *Williams v. Williams*:²

A wife deserted her husband. He entered into an agreement by which he promised to pay her 30s. a week if she would maintain herself and undertake not to pledge his credit. He was sued by the wife when he fell into arrear with the payments, and pleaded in defence that there was no consideration for the agreement at that time. Since she was in desertion she was bound to maintain herself, and could not pledge his credit in any way.

The Court of Appeal held that he was bound to pay. If the wife had made a genuine offer to return, his obligation to maintain her would have revived. In such a case the wife's promise would have been of some value to him, as her maintenance would probably have been fixed by a Court at the agreed figure of 30s. a week. Also she would have been precluded by the agreement from pledging her husband's credit for necessities. The possibility of this contingency was therefore of sufficient benefit to constitute a consideration. But Denning L.J. said:³

Now I agree that, in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, *so long as there is nothing in the transaction which is contrary to the public interest.*

It is submitted, however, that the law does still distinguish between the type of duty involved, and that the remarks of Denning L.J. must be considered to be a departure from existing principle.

Discharge of an Existing Duty

Discharge
of duty no
considera-
tion

The principle that the performance of an existing duty owed to the promisor is an unreal consideration has been applied not only to the creation of a new obligation, but also to the discharge of the existing duty itself. It is clear that full and

¹ At p. 498.

² At p. 151.

³ [1957] 1 W.L.R. 148.

exact performance will act as a valid discharge, but if the performance is only partial and offered in return for a promise to accept it as full satisfaction of the duty, it will not be a sufficient consideration to support the promise and the promisor may subsequently insist that the contract be completely performed. Thus if *A* owes *B* a debt of £200, and *B* agrees to accept £100 in full satisfaction of the debt, *B* is not bound by his promise and may subsequently sue for the whole amount. The payment by a debtor of a smaller sum in satisfaction of a larger is not a good discharge of a debt. Such payment is no more than the promisee is already bound to do, and is no consideration for a promise, express or implied, to forgo the residue of the debt.

If, however, the thing done or given by the promisee is in some respect different from that which the recipient was entitled to demand,¹ it will be a good consideration for the promise to discharge. The fact that the difference is slight will not destroy its efficacy in constituting a consideration, for if the Courts inquired whether the thing done in return for a promise was sufficiently unlike that to which the promisor was already bound, they would be inquiring into the adequacy of the consideration. Even the performance of the identical obligation will be effective if it is to take place at an earlier date or in a different place. So in *Pinnel's Case*:²

Unless a
difference
exists

Pinnel brought an action in Debt on a bond against Cole for payment of £8 10s. on the 11th November, 1600. Cole pleaded that, at the instance of Pinnel, he had paid him the sum of £5 2s. 2d. on the 1st October, and that Pinnel had accepted this in full satisfaction of the debt.

It was resolved by the Court of Common Pleas that the payment of a lesser sum on the day in satisfaction of a greater was no satisfaction of the whole; and this principle is usually known today as the rule in *Pinnel's Case*. But the Court continued:

the gift of a horse, hawk or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc. might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.

¹ e.g. a negotiable instrument: *Goddard v. O'Brien* (1882), 9 Q.B.D. 37.

² (1602), 5 Co. Rep. 117a. For earlier examples of cases in Debt see (1455), Y.B. 33 Hen. VI, fo. 48, pl. 32; (1495), Y.B. 10 Hen. VII, fo. 4, pl. 4. In *Vanbergen v. St. Edmund's Properties, Ltd.*, [1933] 2 K.B. 223, however, it was stated that the new element must have been introduced for the convenience of the promisor, and at his request, whether express or implied.

Judgment was given for the plaintiff on a technical point of pleading;¹ but the fact that the payment and acceptance of part of the money had taken place before the day of satisfaction would otherwise have resulted in judgment for the defendant, for the difference in time would have constituted a good consideration for the promise to discharge the debt.

Foakes v. Beer The rule in *Pinnel's Case* was considered and reaffirmed by the House of Lords nearly three centuries later in the leading case of *Foakes v. Beer*:²

John Foakes was indebted to Julia Beer on a judgment for the sum of £2090. It was agreed by Julia Beer that if Foakes paid her £500 in cash and the balance of £1590 in instalments she would accept this as full satisfaction of the debt. Foakes paid the money exactly as required, but Julia Beer then proceeded to claim an additional £360 as interest on the judgment debt. Foakes refused and, when sued, pleaded that his duty to pay interest had been discharged by the promise to release him.

The House of Lords held that there was no consideration for the promise and that Foakes was still bound to pay the additional sum. 'It is', said the Earl of Selborne,³ 'not really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation.'

It has been argued that the rule is supportable on the ground that the law should not favour a man who is excused money which he ought to pay any more than a man who is promised money which he has not earned. On the other hand, it is open to the criticism that it not only runs counter to ordinary commercial practice, but that taken in conjunction with the rule that the law will not inquire into the adequacy of consideration, it may lead to absurd results. 'According to English Common Law', said Jessel M.R.,⁴ 'a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound.' The rule enables a creditor to go back on an agreement solemnly entered into and intended to affect legal relations; and there are no policy considerations which

¹ See generally Fifoot, *History and Sources of the Common Law (Tort and Contract)*, p. 312.

² (1884), 9 App. Cas. 605.

⁴ *Couldery v. Bartrum* (1881), 19 Ch. D. 394, at p. 399.

³ At p. 613.

would demand the application of the doctrine of consideration to the discharge, as opposed to the formation, of contracts.¹

The Law Revision Committee, in 1937,² accordingly recommended the abolition of the rule in *Pinnef's Case* where the promisee had carried out his side of the agreement, but this reform has never been implemented by statute. There has, however, been recently developed by the Courts a principle of equity which, to a great extent, neutralizes the effect of the rule. It is the doctrine of estoppel, or, as some have termed it, of quasi-estoppel, and it was suggested by Denning J. (as he then was), in *Central London Property Trust, Ltd. v. High Trees House, Ltd.*:³

The plaintiffs by a lease under seal in 1937 let to the defendants a block of flats for a term of ninety-nine years at a rent of £2,500 a year. In 1940, the defendants found that they were unable, on account of the war, to let many of the flats, and the plaintiffs agreed to reduce the rent to £1,250. In 1945 the situation had returned to normal and the flats were again full. A receiver for the debenture holders of the plaintiff company brought an action against the defendants claiming the full original rent both for the future and also for the last two quarters of 1945.

Denning J. held that the action should succeed. It was the intention of the parties that the reduction of rent was to be a temporary expedient while the flats could not be fully let, and that it had ceased to apply early in 1945; therefore the full rent was payable for the last two quarters of 1945, which was all that was actually claimed in the action. But the interesting point of the judgment lies in his contention that, had the plaintiffs sued for the full rent between 1940 and 1945, they would have been *estopped* by their promise from asserting their strict legal right to demand payment in full.

The correctness of this *dictum*⁴ has now been recognized, and it has been subsequently applied in a number of decisions.⁵ For

¹ Sir Frederick Pollock (*Principles of Contract* (13th ed.), p. 150) considered as illegitimate the extension of the doctrine from formation to discharge. *Viz. infra*, p. 396.

² Cmd. 5449; *infra*, p. 107.

³ [1947] K.B. 130; see *Cheshire and Fifoot* (1947), 63 L.Q.R. 283; (1948), 64 L.Q.R. 28; *Wilson* (1951), 67 L.Q.R. 330; *Denning* (1952), 15 Mod. L.R. 1; *Sheridan* (1952), 15 Mod. L.R. 338; *Bennion* (1953), 16 Mod. L.R. 441; *Guest* (1956), 30 Aust. L.J. 187; *Fridman* (1957), 35 Can. Bar Rev. 279.

⁴ Being based on hypothetical facts, it is *obiter dictum* and not *ratio decidendi*.

⁵ *Ledingham v. Bermejo Estancia Co., Ltd.*, [1947] 1 All E.R. 749; *Wallis v. Semark* (1951), 67 (2) T.L.R. 222; *Mitas v. Hyams* (1951), 67 (2) T.L.R. 1215; *Perrott v. Cohen*, [1951] 1 K.B. 705; *Tungsten Electric Co., Ltd. v. Tool Manufacturing Co., Ltd.*, (first case) (1950), 69 R.P.C. 108; (second case)

some time, however, it was regarded with some suspicion by the Courts,¹ and received a cold welcome from academic writers of an orthodox frame of mind. In particular, three criticisms were levelled against it:

Criticisms: In the first place, it was said to be inconsistent with the decision of the House of Lords in *Foakes v. Beer*. But the principle which was relied upon by Denning J. was that of estoppel, which has to be specially pleaded. The essence of the doctrine of estoppel is that a person who makes to another a representation intended to be acted upon and which is in fact acted upon to his detriment by the person to whom the representation is made, will be prevented from going back on, or acting inconsistently with, his previous statement.² The plea of estoppel was never raised in *Foakes v. Beer*; had it been raised, the result, as we shall see, might well have been different.

Jorden v. Money Secondly, it is said that it offends against the well-known rule in *Jorden v. Money*. In 1854, in the case of *Jorden v. Money*,³ the House of Lords laid down the general rule that only a representation of existing or past fact, and not one relating to future conduct will ground an estoppel; the doctrine would therefore not apply, as in the *High Trees Case*, to a promise given as to the future. But Denning J. was able to show that, in equity, where two parties stand together in a contractual or other similar legal relationship, and one of them makes to the other a promise to waive, suspend, or vary his strict legal rights, the promisor may be estopped from acting inconsistently with the promise which he has made. Clear authority for this proposition could be found in the case of *Hughes v. Metropolitan Railway Co.*:⁴

The plaintiff served on the defendants a notice to repair, within six months, houses held on lease from him. Failure to comply with this notice within the stipulated period would entitle the plaintiff to forfeit the lease. The parties subsequently entered into negotiations for the purchase of the property, and these continued for almost the entire period of the notice. Shortly before the notice was due to expire, the plaintiff

[1955] 2 All E.R. 657; *Buckland v. Commissioner of Stamp Duties*, [1954] N.Z.L.R. 1194; *P. v. P.*, [1957] N.Z.L.R. 854.

¹ e.g. by Asquith L.J. in *Combe v. Combe*, [1951] 2 K.B. 215, at p. 225.

² *MacLaine v. Gatty*, [1921] 1 A.C. 376, at p. 386.

³ (1854), 5 H.L.C. 185, and applied in *Maddison v. Alderson* (1883), 8 App. Cas. 467, at p. 473.

⁴ (1877), 2 App. Cas. 439; *Birmingham and District Land Co. v. L. & N.W. Railway Co.* (1888), 40 Ch. D. 268; *Panoutsos v. Raymond Hadley Corporation of New York*, [1917] 2 K.B. 473; *infra*, p. 403.

broke off the negotiations, and, upon expiry, brought an action for possession claiming to have forfeited the lease.

The House of Lords held that, by entering into negotiations, the plaintiff impliedly promised to suspend the notice previously given and that the defendants had acted upon this promise by doing nothing to repair the premises. The six months period was to run only from the breakdown of the negotiations as the plaintiff was estopped from going back on this promise which he had made. Lord Cairns described the principle as follows:¹

It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

The rule in *Jorden v. Money* has therefore no application to such a situation.

Finally, it is said that, in order to justify the application of the principle of estoppel, there must be some detriment to the promisee, incurred in reliance upon the promise made to him.² This requirement has always formed part of the classic definition of estoppel, and there was such a detriment in the case of *Hughes v. Metropolitan Railway Co.* It may well be that this is the weak link in the chain, for it is clear that the *High Trees Case* cannot in consequence be regarded as completely *in pari materia* with *Hughes v. Metropolitan Railway Co.* Nevertheless, the repudiation of a promise solemnly given and intended to affect legal relations may, in itself, be inequitable, provided that the promisee has acted on it. This view has been consistently put forward by Lord Denning³ and has received some measure of tacit support from the decision of the House of Lords in *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*,⁴ which is discussed below. At common law, too, the waiver of an existing obligation does not appear to require the

Detriment
to promisee

¹ At p. 448.

² *John Odlin & Co., Ltd. v. Pillar*, [1952] Gaz. L.R. 501 (N.Z.).

³ (1952), 15 Mod. L.R. 1.

⁴ [1955] 2 All E.R. 657; *infra*, p. 104. See also *P. v. P.*, [1957] N.Z.L.R. 154.

presence of consideration, or detriment, in order to make it effective.¹

Scope of principle With the recognition of the *High Trees* principle has also come a more precise definition of its scope.

Cannot create new contract In the first place, it only applies to the variation or discharge of an existing obligation, and not to the formation of a new contract. This is clearly shown by the case of *Combe v. Combe*:²

A husband, upon divorce, promised his wife £100 a year as a permanent allowance. In reliance upon this promise, the wife forbore to apply to the court for maintenance. The husband failed to make the payments, and the wife sued him on the promise.

The Court of Appeal held that there was no consideration for the promise as the wife's forbearance was not in respect of the promise made to her;³ nor could the wife rely on the *High Trees* estoppel, for as Denning L.J. put it:⁴

the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.

It is only to be used as a defence, and not to found a new obligation. It is, as it was said, 'a shield and not a sword'.

Suspension of existing obligation Secondly, it has been suggested by certain writers⁵ that such a promise only serves to suspend, and not wholly to extinguish, the existing obligation; the promisor may, upon giving due notice, resume the right which he has suspended and revert to the original contract. Thus in *Tool Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*:⁶

By a licence and deed in 1938 the appellants granted to the respondents a licence to import, make, use and sell certain material (hard metal alloys) made in accordance with patent rights held by them. The respondents were to pay royalties on the material made, and to pay 'compensation' if the amount of material made exceeded a named quota. In 1939, on the outbreak of war, the appellants voluntarily agreed to suspend their right to compensation, it being contemplated that a new agreement would be entered into when the war ended.

¹ *Buttery v. Pickard* (1946), 62 T.L.R. 24; *Rickards v. Oppenheim*, [1950] 1 K.B. 616; *infra*, p. 402.

² [1951] 2 K.B. 215. Cf. *Perrott v. Cohen*, [1951] 1 K.B. 705.

³ *Supra*, p. 78. Cf. *Sloan v. Union Oil Co. of Canada, Ltd.* [1955], 4 D.L.R. (2d) 664 (Canada).

⁴ At p. 220.

⁵ e.g. *Wilson* (1951), 67 L.Q.R. 30.

⁶ [1955] 2 All E.R. 657.

In 1944, disputes arose between the parties and, in 1945, the appellants claimed to have revoked their suspension and to be entitled to compensation from June 1st, 1945. This claim failed on the ground that the revocation was premature as no adequate notice to determine the new arrangement had been given to the respondents.

In 1950, the appellants brought the present action, claiming compensation from Jan. 1st, 1947, at which date the respondents were fully aware that the appellants were determined to revert to the original agreement.

The House of Lords held that the appellants had effectively revoked their promise to suspend their strict legal rights and that they were entitled to the compensation claimed; the equitable principle enunciated by Lord Cairns in *Hughes v. Metropolitan Railway Co.* was applicable to the situation, but the promisor might, on giving adequate notice to the promisee, resume his rights under the original agreement. As Bowen L.J. had said in an earlier case:¹

It [the principle] seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.

The temporary effect of the estoppel raised is, it has been argued, the characteristic of the doctrine and the reason why it should be considered a 'quasi-estoppel' rather than a true example of estoppel in equity or at common law. But although all the cases in which it has so far been applied have, in fact, been promises to suspend, and not to abandon, existing rights, and have therefore lent support to this limitation, it formed no part of Lord Cairns's original statement, and it is possible to conceive situations where its effect would be permanent.² For example, if the promise was stated to be binding 'for the remainder of the contract', or if the promisee could not be put back into the same position as he was before, the estoppel raised might well be of a permanent nature.

In addition to the above principle, there are two other exceptions to the rule in *Pinnel's Case*. The first is where a Further exceptions

¹ *Birmingham and District Land Co. v. L. & N.W. Railway Co.* (1840) Ch. D. 268, at p. 286.

² See *Fenner v. Blake*, [1900] 1 Q.B. 426; *Salisbury v. Gilmore*, [1942] 2 K.B. 38.

debtor makes a composition with his creditors; the second is where part payment of a debt is made by a third party to the contract.

**Composi-
tions with
creditors** A composition with creditors (apart from any statutory provisions of the Bankruptcy Acts) is an exception to the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. There is no difficulty as to the consideration between the creditors *inter se*; it is the forbearance on the part of each of them to claim the whole amount of his debt so that no one creditor may gain at the expense of the others. But as regards the debtor, the promise to pay, or the payment of, a portion of the debt is not the consideration upon which the creditor renounces the residue. This was pointed out by Lord Ellenborough in *Fitch v. Sutton* when he said:¹

It is impossible to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*.

The consideration must, then, be something other than the payment of a smaller sum in satisfaction of a larger, and it has been suggested that it consists in the procuring of a promise from each creditor to accept less than the full amount of his debt, thereby conferring a benefit on the creditors generally.² This solution is satisfactory so far as it goes, for there is no doubt that such a consideration would be sufficient, but it cannot apply to a case in which the debtor does not in fact procure the creditor's promises. A more acceptable reason for the existence of this exception would seem to be that a party to such an arrangement cannot claim his original debt because to do so would be to commit a fraud on the other creditors.³

**Part pay-
ment by
third party** This would also account for the existence of the second exception, that a creditor who promises to discharge a debtor in return for the part payment of the debt by a third party cannot later recover the balance from the debtor. In *Welby v. Drake*,⁴ for example, the creditor had received £9 from the debtor's father in satisfaction of a debt of £18. Abbott C.J. said that proceedings against the son for the balance of the debt

¹ (1804), 5 East 230, at p. 232.

² *Good v. Cheesman* (1831), 2 B. & Ad. 328.

³ *West Yorkshire Darracq Agency, Ltd. v. Coleridge*, [1911] 2 K.B. 326.

⁴ (1825), 1 C. & P. 557.

would be a fraud on the father, and held that the payment by the father was a bar to recovery against the son. And in *Hirachand Punamchand v. Temple*:¹

The father of a debtor wrote to the plaintiffs, his creditors, offering to pay part of the debt in satisfaction of the whole, and enclosing a cheque for that amount. The plaintiffs cashed the cheque, and then sued the son for the balance.

The Court of Appeal held that the creditors must be deemed to have accepted the cheque in full satisfaction, and that the son's debt was extinguished. It approved a dictum of Willes J. in *Cook v. Lister*:²

if a stranger pays part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors.

These two exceptions must therefore be considered to be based on reasons of policy rather than on logical evasions of the strict doctrine of consideration.

*Note on the Recommendations of the Law Revision Committee*³

In their Sixth Interim Report in 1937 (Cmd. 5449) the Law Revision Committee have made a number of recommendations for drastic amendments of the law. They point out, among other criticisms, that the doctrine of consideration cannot be justified as a means of distinguishing between onerous and gratuitous agreements because adequacy of consideration is immaterial, and some promises which are technically supported by consideration are, in fact, nothing but purely gratuitous promises; that serious business inconvenience may be caused by the rule that a promise to pay a smaller sum in discharge of a greater is invalid unless made under seal, and that this has led to devices for circumventing the rule, such as that a change in the time or mode of payment, often quite illusory in character, or the addition by the debtor of 'a canary or a tom-tit', will constitute consideration for the creditor's promise to forgo part of his debt; that it may defeat the reasonable expectations of a party in the common case of a gratuitous promise to keep an offer open for a stated period, on the strength of which the offeree may have incurred trouble and expense for which he will have no remedy.

¹ [1911] 2 K.B. 330.

² (1863), 13 C.B., N.S. 543, at pp. 595, 596.

³ For a useful appraisal of these proposals see Lord Wright, *Legal Essays and Addresses*, xi; Hamson (1938), 54 L.Q.R. 233; Lord Normand (1939), 55 L.Q.R. 358.

The Committee sum up the present position by saying that in many cases the doctrine is a mere technicality, irreconcilable either with business expediency or common sense.

They do not, however, recommend its total abolition. Their main proposal is that an agreement should be enforceable if *either* the promise or offer has been made in writing by the promisor or his agent, *or* if it is supported by valuable consideration, past or present. This in effect would establish the law as it was laid down by Lord Mansfield in *Pillans v. Van Mierop*.

Besides this the Committee recommend certain particular amendments in the doctrine:

(a) An agreement to accept a lesser sum in discharge of an enforceable obligation to pay a larger sum should be deemed to have been made for valuable consideration, but if the new agreement is not performed, then the original obligation should revive;

(b) An agreement in which one party makes a promise in consideration of the other doing or promising to do something which he is already bound to do by law, or by a contract either with the other party or with a third party, should be deemed to have been made for valuable consideration. But to this the Committee make the proviso that such agreements must be free from objection on the score of legality or public policy; e.g. a promise in return for an agreement by a police authority to give precisely the protection it is bound to give by law should not be enforceable;

(c) A promise should be enforceable by the promisee though the consideration is given by or to a third party (that is to say, it should not be necessary that consideration should move from the promisee);

(d) An agreement to keep an offer open for a definite period or until the occurrence of some specified event should not be unenforceable by reason of the absence of consideration;

(e) A promise made in consideration of the promisee performing an act should constitute a contract as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed (that is to say, a promisor should not be able, as he is under the present law, to withdraw his offer after the offeree, to his knowledge, has entered upon the performance);

(f) A promise which the promisor knows, or reasonably should know, will be relied upon by the promisee should be enforceable if the promisee has altered his position to his detriment, in reliance on the promise. This would, in effect, extend the principle in *Hughes v. Metropolitan Railway Co.* to the formation of a contract, and so reverse the decision in *Combe v. Combe*;

(g) The Committee also considered the rule that consideration must move from the promisee in its relation to the doctrine of privity of contract; but this topic, together with the Committee's recommendation, will be dealt with in a later chapter.

CHAPTER IV

THE TERMS OF THE CONTRACT

ONLY the most simple contracts consist of a single promise or undertaking on both sides. In most cases the contract is composed of a number of contractual terms, and it is now our task to consider the nature of these terms and the form which they may take. In this chapter, therefore, we shall first concern ourselves with those terms which have been expressly inserted by the parties themselves, and then those which will be implied by the law.

Contracts which are contained in writing are governed by special rules of construction and interpretation when they come before the Courts. And if the terms of the contract are contained in some 'standard form' document, as many are today, this may give rise to special rules of notice between the contracting parties.

I. EXPRESS TERMS

Contracts are normally made up of various statements and promises on both sides, differing in character and importance; the parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. Where one of these is broken the Court must discover, from the tenor of the contract or the expressed intention of the parties, whether the broken term was vital to the contract or not. This is a matter for the Court to determine and not a question of fact for the jury.

Conditions
and war-
ranties

If the parties regarded the term as essential, it is a *condition*: its failure entitles the other party to treat the contract as discharged. If they did not regard it as essential, but as subsidiary or collateral, it is a *warranty*; its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term. Thus from one point of view a warranty may be regarded as a promise of indemnity against a failure to perform a particular term of the contract. Warranty and condition alike are parts, and only parts of a contract, consisting in various terms.¹

¹ *Wallis v. Pratt*, [1910] 2 K.B. 1003, at p. 1012 (reversed, [1911] A.C. 394).

Conditions

Conditions
defined

A condition may be defined as a statement of fact, or a promise, which forms a term of the contract, and which, if unfulfilled, allows the other party to repudiate the contract.

A good illustration of a statement of fact forming a condition is the case of *Behn v. Burness*,¹ where a ship was stated in the contract of charter-party to be 'now in the port of Amsterdam', and the fact that the ship was not in that port at the date of the contract discharged the charterer from performance. An example of a promise is provided by the case of *Glaholm v. Hays*:²

A vessel was chartered to go from England to Trieste and there load a cargo, and the charterparty contained this clause: 'the vessel to sail from England on or before the 4th day of February next.' The vessel did not sail for some days after the 4th of February, and on its arrival at Trieste the charterers refused to load a cargo and repudiated the contract.

It was held that the charterers were entitled to be discharged. The judgment of the Court of Common Pleas was thus expressed:³

Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates. . . . Upon the whole, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to have been a condition precedent.

Conditions
precedent

The idea which underlies the use of the word 'condition' in this context is that the term is so vital to the operation of the contract that it forms a condition precedent to its existence. But in the modern law, the question whether a term is a condition or a warranty is more relevant to the remedies for breach than to the formation of a contract. It is, perhaps, only seen in its pristine sense where the parties agree that the operation of the contract shall be suspended until a certain event shall occur. The contract is made conditional upon the happening of that event. In *Pym v. Campbell*,⁴ for example:

¹ (1862), 1 B. & S. 877; (1863), 3 B. & S. 751.

² (1841), 2 M. & G. 257.

³ *Ibid.*, at pp. 266, 268.

⁴ (1856), 6 E. & B. 370.

Campbell agreed to purchase of Messrs. Pym a part of the proceeds of an invention which they had made. They drew up and signed a memorandum of this agreement on the express verbal understanding that it should not bind them until the approval of one Abernethie had been expressed. Abernethie did not approve of the invention, and Campbell repudiated the contract.

The Court of Queen's Bench allowed him to do so, for the approval of Abernethie was clearly a condition precedent to the contract becoming binding upon him.

Another sense in which the word 'condition' is used is that of a condition subsequent, where the parties agree that the contract shall be determinable at the option of one of them, or where they provide that the fulfilment of a condition or the occurrence of an event shall discharge one of them or both from further liability under the contract. In *Head v. Tattersall*¹ for example:

Head bought a horse of Tattersall. The contract of sale provided, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should have the liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned on the day named, but in the meantime had been injured through no fault of Head.

It was held that, since Head had validly exercised his option under the contract, there was no sale and that Tattersall must therefore bear the loss. Cleasby B. said:²

The effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event when it would revert in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is revested, and he must therefore bear the loss.

This type of condition may be further illustrated within certain limits by the 'excepted risks' of a charter-party. The shipowner agrees with the charterer to make the voyage on the terms expressed in the contract, 'the act of God, the King's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature or kind, during the said voyage, always excepted'. If while the contract is in course of performance the

Conditions
subsequent

Excepted
risks of
charter-
party

¹ (1871), L.R. 7 Ex. 7.

² At p. 14.

ship is sunk by a peril of the seas, the shipowner commits no breach of contract by failing thereafter to carry out his contractual obligations; he is protected by the exception in the contract. In the above case the contract is obviously at an end and the parties are discharged; but the excepted peril may only partially affect performance or delay or hinder it, as if the ship should be laid up for a time for the purpose of repairs necessitated by bad weather. The shipowner cannot be sued for damages caused by the delay, but the contract (unless the delay is so excessive as to frustrate the whole purpose of the adventure) is not discharged, and the shipowner must continue to perform it as soon as the repairs are completed. The occurrence of an excepted peril does not therefore necessarily discharge the whole contract though it may do so.¹

Warranties

War-
ranties The nature of a warranty, as compared with a condition, is best illustrated by the case of *Bettini v. Gye*:²

Bettini entered into a contract with Gye, the director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts for a period of three months. Among the terms of the contract was an undertaking that he would be in London six days at least before the commencement of his engagement, for rehearsals. He only arrived two days before the engagement commenced, and Gye thereupon repudiated the contract. He was sued by Bettini for breach.

The case was heard by the Queen's Bench Division. Blackburn J., in delivering the judgment of the Court, described the process by which the true meaning of such terms in contracts is ascertained. First, he asked,³ does the contract give any indication of the intention of the parties?

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

¹ An example of an *implied* provision of the same nature can be found in the contract of a common carrier, who is said to warrant the safety of the goods entrusted to him with the exception of certain risks, e.g. an 'Act of God', 'the King's enemies', and also injuries arising from defects inherent in the thing carried.

² (1876), 1 Q.B.D. 183.

³ At p. 187.

He found in the present contract no such expression of the intention of the parties; this being so, the interpretation of the disputed term remained for the Court. The Court pointed out that if the engagement had been only to sing in operas, or if it had been only for a few performances, the term as to rehearsals might well have been vital to the contract. But in all the circumstances of this particular contract they held that it was not a condition but merely a warranty; its breach did not therefore operate as a discharge and could be compensated for by damages.

With this case we may contrast *Poussard v. Spiers*,¹ where, on a contract somewhat similar in subject-matter to that in *Bettini v. Gye*, the failure of an artiste to attend the final rehearsals and the first performance of a new French opera in which she was to take the principal female part was held to go to the root of the consideration and to discharge the defendants.

compared
with condi-
tions

It is right to observe, however, that the word 'warranty' is used in a variety of senses, and that in many of the earlier cases and also in insurance law² it is not infrequently equivalent to a term of the contract, whether a warranty proper or a condition. It is here to be contrasted with a mere representation which forms no part of the contract itself but only induces one of the parties to enter into it; the person making such a representation does not *warrant* its accuracy, i.e. promise to make it good. Thus in *Oscar Chess, Ltd. v. Williams*:³

and mere
misrepresen-
tation

In 1954 the defendant's mother bought a second hand Morris motor-car on the understanding that it was a 1948 model, and the registration book showed that it was first registered in 1948. In 1955 the defendant sold the car to the plaintiffs on the same understanding. The transaction was a trade-in, and the calculated value of a 1948 car was £290. Eight months later the plaintiffs discovered that it was a 1939 model, the calculated value of which was only £175. They sued the defendant for the balance as damages for breach of warranty.

The Court of Appeal (Morris L.J. dissenting) held that the statement that it was a 1948 car was not a warranty but merely an innocent misrepresentation not giving rise to a claim for damages. There was no intention on the part of the defendant that there should be contractual liability in respect of the accuracy of the statement. As Denning L.J. put it:⁴ 'If the

¹ (1876), 1 Q.B.D. 410.

² Marine Insurance Act, 1906 (6 Edw. VII, c. 41), ss. 33-41.

³ [1957] 1 W.L.R. 370, following *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30; *infra*, p. 207.

⁴ At p. 376.

seller was asked to pledge himself to it, he would at once have said "I cannot do that. I have only the log-book to go by, the same as you."

Definition
of warranty

As contrasted with a condition, however, a warranty bears a rather different meaning. 'A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it';¹ or, to take a definition from another case:² 'the proper significance of the word in the law of England is an agreement which refers to the subject matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract'.

Warranties 'ex post facto'

Warranties
ex post facto

One cause of confusion which overhangs the use of the term warranty arises from the rule that a condition may, as it were, change its character in the course of the performance of a contract. A condition the breach of which would have effected a discharge if treated as such at once by the promisee, ceases to be a condition if he goes on with the contract and takes a benefit under it.³ It is then called a warranty *ex post facto*. This aspect of a condition is well illustrated by the case of *Pust v. Dowie*:⁴

A vessel was chartered for a voyage to Sydney; the charterer promised to pay £1,550 for this use of the vessel on condition of her taking a cargo of not less than 1,000 tons weight and measurement. He had the use of the vessel as agreed upon, but refused to pay the stipulated sum. He claimed that the ship was not capable of holding so large a cargo as had been made a condition of the contract, and that he was therefore discharged from his part of the bargain.

The Court of Exchequer Chamber held that the condition had, in fact, been fulfilled; but, had this not been so, since a substantial part of the consideration had been received by the charterer, he could not have treated it as a condition, but only as a stipulation for breach of which damages might be obtained. Erle C.J. said:⁵

¹ *Chanter v. Hopkins* (1838), 4 M. & W. 399, *per* Lord Abinger C.B. at p. 404.

² *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413, *per* Lord Haldane at p. 422.

³ *Graves v. Legg* (1854), 9 Ex. 709, at p. 717.

⁴ (1863), 5 B. & S. 33.

⁵ At p. 37.

The case falls within the principle that where the whole or any substantial part of the consideration for the promise of the one party has been received by the other, the latter cannot treat it as a condition, but as a stipulation for breach of which he may obtain compensation in damages. Here the hull of the ship has been placed at the disposal and service of the charterer, and if there were matter by reason of which he might have refused to take the ship, or for which he might be indemnified in reduction of damages when he has put on board a cargo, still he cannot be allowed to say that he will not pay anything.

The Sale of Goods Act, 1893, which codifies the law relating ^{Sale of goods} to the contract of sale of goods, gives statutory force to the rule that a person who affirms the contract by the receipt of a substantial part of the consideration contracted for may lose his right to treat the contract as repudiated and have to fall back on his remedy in damages, i.e. he may have to treat the breach of a condition as if it had been a mere breach of warranty. Section 11 (1) (c) of the Act enacts:

Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

The terms 'condition' and 'warranty' are used in the Act in the senses given above; that is to say, a condition is a stipulation the breach of which may give rise to a right to treat the contract as repudiated, a warranty is one the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.¹ Three points, however, require explanation.

In the first place, the word 'accept' in the phrase 'and the ^{Acceptance} buyer has accepted the goods' bears a technical meaning. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.²

Secondly, we must observe that acceptance does not neces- ^{Severable contracts} sarily have this effect if the contract is severable, that is to say,

¹ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 11 (1) (d).

² Ibid., s. 35.

if delivery of the goods is to be made by instalments. In such a case the Act provides that 'if the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated'.¹

Thirdly, where the sale is one of specific goods, i.e. where they are identified and agreed upon at the time the contract of sale is made, the buyer loses the right to reject once the property in the goods has passed to him. The Act provides that 'where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed'.² So where the goods are specific, the right to reject seems to be lost as soon as the contract of sale is made.³

The operation of section 11 (1) (c) may be illustrated by the case of *Leaf v. International Galleries*:⁴

The plaintiff bought from the defendants a picture of Salisbury Cathedral which the defendants represented to him at the time of the purchase to have been painted by Constable. Five years later, when he tried to sell it, he discovered that this was not the case. He endeavoured to return the picture and to recover the price. The defendants refused, whereupon he brought an action claiming rescission of the contract, but not damages for breach of warranty.

The Court of Appeal held that, assuming the representation to have been a term of the contract and a condition, the right to reject had been taken away by the section, the buyer having accepted the goods. The plaintiff's only remedy was in damages, and, since he had omitted to plea to this effect, judgment must be given against him.

It is also possible for a party who has a right to repudiate a contract for breach of condition of his own wish to treat the breach of condition as a breach of warranty and to sue instead for

¹ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 31 (2); viz. *infra*, p. 420.

² *Ibid.*, s. 18, rule 1.

³ This inconvenient result is examined by Smith (1951), 14 Mod. L.R. 173, and Atiyah (1956), 19 Mod. L.R. 315.

⁴ [1950] 2 K.B. 86.

damages.¹ This is given statutory effect in respect of the sale of goods by section 11 (1) (a) of the Sale of Goods Act:

Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

The only limitation placed upon this power of waiver is that the stipulation waived must be exclusively for that party's own benefit.²

II. IMPLIED TERMS

We now come to consider those cases where the law will imply into a contract terms which the parties have not themselves expressly inserted. The cases in which the Courts will do this are strictly limited, for they rightly conceive that it is not their task to make contracts for the parties concerned, but only to interpret the contracts already made. Nevertheless, in certain circumstances the Courts are prepared to imply terms.

The 'Moorcock'

Sometimes the parties to a contract may, either through forgetfulness or through bad drafting, fail to incorporate into the contract terms which, had they adverted to the situation, they would certainly have inserted to complete the contract. In such cases the Courts may, in order to give 'business efficacy' to the transaction imply such terms as are necessary to effect that result.

The leading case is that of *The 'Moorcock'*, where Bowen L.J. said:³

Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe that if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all such events it should have.

¹ *Sullivan v. Constable* (1932), 48 T.L.R. 369.

² *Hartley v. Hymans*, [1920] 3 K.B. 475. ³ (1889), 14 P.D. 64, at p. 68.

In that case:

The defendants were wharfingers, and owners of a wharf and jetty on the river Thames. The plaintiff was the owner of the steamship *Moorcock*. It was agreed between them that the vessel should be discharged and loaded at the defendants' jetty, hire being paid for the use of cranes and other facilities on the wharf. While the *Moorcock* was lying there, the tide ebbed and she came to rest on a ridge of hard ground beneath the mud and sustained damage.

The Court of Appeal held that the parties must have intended to contract on the basis that the ground was safe for the vessel at low tide, and therefore a term would be implied that the berth was reasonably safe for the purpose of loading and unloading. For a breach of this implied term the defendants were liable.

But this principle has subsequently become unpopular, and it is often regarded as the last resort of counsel in distress. ^{'Flushing the Moorcock'} Bowen L.J. would, it has been said,¹ 'have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and . . . might sympathize with the occasional impatience of his successors when the *Moorcock* is so often flushed for them in that guise'. A case in which the *Moorcock* was unsuccessfully 'flushed' is that of *Easton v. Hitchcock*:²

The defendant, a married woman, engaged the plaintiff, a private enquiry agent, to watch her husband. The plaintiff used several employees in succession for this purpose. One of these, having left the plaintiff's service, improperly divulged the matter, and the husband was informed that he was being watched. After this appraisal the further observations conducted by the plaintiff became useless, and the defendant refused to pay for them relying on an implied term of secrecy in the agreement.

It was held that no such term could be implied. Although it was clearly necessary to the running of a detective agency that secrecy should be maintained, there could be no warranty that ex-employees would forever keep silent.

The doctrine is, therefore, of narrow application, and the requirements are stringent:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander

¹ *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206, per MacKinnon L.J. at p. 227.

² [1912] 1 K.B. 535.

were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'¹

But it has frequently been applied where the circumstances demand it, and particularly where the contract would fail completely unless such a term were implied, or where, in effect, it gives substance to the whole transaction. For example, if a builder undertakes to build a house for a purchaser, it is an implied condition of the contract that the house will, when completed, be fit for habitation; it is of the essence of the agreement that it should be fit for this purpose.² But where a purchaser normally buys an unfurnished house, there is no such implied term; the contract will be effective without it, and, though reasonable, it cannot be said to be a *sine qua non* of the transaction.

Terms implied by Custom

Terms may be implied by the custom of a locality or by the usage of merchants in a particular trade, but such a custom or usage must be notorious, certain, and reasonable, and must not offend against the intention of any legislative enactment.

An example of a term implied by custom can be found in *Hutton v. Warren*,³ where an outgoing tenant established his right to reasonable allowances for seeds and labour expended on the land even though the lease contained no express term to this effect. And *Lord Eldon v. Hedley Brothers*⁴ provides an illustration of a term implied by the usage of a particular trade, namely, the hay trade. Normally, where goods are bought subject to the determination of the weight or measurement of the goods in order to ascertain the price, the property in the goods does not pass to the buyer until such act is done and he has notice thereof.⁵ But in that case it was held that, in the hay trade, where hay dealers bought hay in stacks, either by the ton or for a lump sum, it was usual for the property to pass at the time the contract was made, and a term should be implied into the contract to this effect.

A custom or usage which has become an implied term of the

¹ *Shirlaw v. Southern Foundries (1926), Ltd.*, [1939] 2 K.B. 206, per MacKinnon L.J. at p. 227; *McClelland v. Northern Ireland General Health Services Board*, [1957] 1 W.L.R. 594.

² *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113; *Lynch v. Thorne*, [1956] 1 W.L.R. 31.

³ (1836), 1 M. & W. 466.

⁴ [1935] 2 K.B. 1.

⁵ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 18.

Exclusion
of custom-
ary terms

contract may be excluded by the parties, either expressly or impliedly, where it is inconsistent with one of the express terms of the contract. In *Harley & Co. v. Nagata*¹ it was held that, in the case of a time-charter-party, a custom that the commission of the broker who negotiated the charter-party should be paid out of the hire that was earned, and should not be payable at all unless hire was in fact earned, should be imported into the brokerage contract. But in *Les Affréteurs Réunis Société Anonyme v. Walford*² such a custom could not be set up in the face of an express provision that 'a commission of 3% on the estimated gross amount of hire is due (to the broker) on signing this charter', in other words, whether any hire was earned or not.

Certain usages of the mercantile community at large have been codified in the Bills of Exchange Act, 1882,³ in the Sale of Goods Act, 1893,⁴ and in other statutory enactments.

Sale of Goods

Implied
terms in
sale of
goods

The parties to a contract of sale of goods may naturally include in the contract such terms, whether conditions or warranties, as they may agree upon. But the contract is of such everyday occurrence, and it is commonly made with so little consideration of the exact legal results which the parties would desire to produce by it, that if their rights and obligations were to be determined only by what they say or do when they make the contract their reasonable expectations would often be defeated. Consequently certain conditions and warranties are *implied* in a contract of sale. These conditions and warranties were originally implied by the mercantile custom of this country, but they were clearly and successfully codified by the famous lawyer and draftsman, Sir Mackenzie Chalmers, in sections 12–15 of the Sale of Goods Act, 1893.⁵

(a) *Implied undertakings as to title*

Title In the absence of a contrary intention, the following undertakings as to title are implied by section 12 of the Act:

- (1) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an

¹ (1917), 23 Com. Cas. 121.

² [1919] A.C. 801, *infra*, p. 351.

³ 45 & 46 Vict., c. 61.

⁴ 56 & 57 Vict., c. 71.

⁵ For a more detailed study see Chalmers, *Sale of Goods Act* (13th ed.); Benjamin on *Sale of Personal Property* (8th ed.); Atiyah, *Sale of Goods* (1957).

agreement to sell, he will have a right to sell the goods at the time when the property is to pass:

- (2) An implied warranty, that the buyer shall have and enjoy quiet possession of the goods:
- (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party, not declared or known to the buyer before or at the time when the contract is made.

An example of the application of this section can be seen in *Mason v. Burningham*,¹ where the plaintiff, who had bought from the defendant a second-hand typewriter which later turned out to have been stolen, was able to recover damages for breach of the warranty implied by section 12 (2).

(b) *Sale by description*

Section 13 of the Act deals with sale by description:

Sale by
description

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

A sale of goods by description is a sale in which the buyer contracts in reliance on the description,² even though the goods may be specific³ and even though, but more rarely, he has seen the goods.⁴ The leading case is that of *Varley v. Whipp*:⁵

The plaintiff offered to sell to the defendant a reaping machine described by him as 'a second hand self-binder reaping machine, then at Upton, new the previous year and only used to cut 50 acres.' The defendant agreed to purchase on the faith of this description without having seen the machine. On delivery, he found that it was, in fact, a very old machine and returned it to the plaintiff. He was sued by the plaintiff for the price.

It was held that the defendant was entitled to reject the machine. He had bought in reliance on the description and the goods did not correspond with the description.

(c) *Implied conditions as to quality or fitness*

The general rule of a contract of sale, as of other contracts, is *caveat emptor*. Ordinarily, therefore, there is no implied Quality or
fitness

¹ [1949] 2 K.B. 545; *Niblett v. Confectioners' Materials Co.*, [1921] 3 K.B. 387; *Rowland v. Divall*, [1923] 2 K.B. 500.

² *Wallis, Son & Wells v. Pratt*, [1911] A.C. 394.

³ *Varley v. Whipp*, [1900] 1 Q.B. 513.

⁴ *Nicholson & Venn v. Smith Marriot* (1947), 177 L.T. 189.

⁵ [1900] 1 Q.B. 513; *Moore & Co. v. Landauer & Co.*, [1921] 2 K.B. 519.

condition or warranty of the quality of goods sold or of their fitness for any particular purpose. But the Act contains important qualifications of this principle. In section 14 (1) it is enacted:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

The meaning of this section is illustrated by *Chapronière v. Mason*.¹

The plaintiff bought a bath bun at a baker and confectioner's shop belonging to the defendant. When he bit the bun, one of his teeth struck a stone and was broken by it.

It is clear that one who buys a bath bun from a baker makes known to him by implication that he requires it for the purpose of eating; that in such a case the buyer relies on the baker's skill or judgment; and that bath buns are goods which it is in the course of a baker's business to supply. In this case, therefore, there was an implied condition that the bun should be reasonably fit for eating, and the Court of Appeal thought that the presence of a stone in the bun was evidence that it was not so. Another example is that of *Wallis v. Russell*² where a little girl bought from a fishmonger 'two nice fresh crabs for tea'. The crabs were not fresh; indeed, they were highly poisonous. The fishmonger was liable in damages for breach of this implied condition.

Trade-names This sub-section does not apply where an article is sold under its patent or trade-name. It has, however, been extended outside contracts for the sale of goods to contracts to do work and supply materials (e.g. to the repair of a motor-car),³ when the circumstances show that the person giving the order relies on the contractor's skill and judgment.

Quality of goods sold Section 14 (2) of the Act also deals with a condition as to the quality of the goods sold:

¹ (1905), 21 T.L.R. 633; *Preist v. Last*, [1903] 2 K.B. 148; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608; *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] A.C. 74.

² [1902] 2 Ir. Rep. 585.

³ *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46.

Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

This sub-section overlaps in its application section 14 (1), for the word merchantable means that the goods are at least fit for the purpose for which they are normally used. So in one case where a purchaser contracted dermatitis from wearing a pair of woollen underpants containing an excess of sulphite, the vendor was liable under both sub-sections.¹

But this is not always so. In *Wren v. Holt*,² for example:

The defendant kept a beer house in which, as the plaintiff was aware, only the beer of Holden & Co. was supplied. The beer supplied to the plaintiff contained arsenic and his health was injured by drinking it.

The jury found as a fact that the plaintiff did not rely on the skill or judgment of the defendant as to the quality of his beer, and therefore the case did not fall within section 14 (1). But it was held that the plaintiff having asked for Holden's beer, the case fell within section 14 (2). The beer was bought by description from a seller who dealt in beer of that description; it was not of merchantable quality; the defect could not have been revealed by examination. The plaintiff accordingly recovered £50 damages. Also in *Wilson v. Rickett, Cockerell & Co., Ltd.*:³

The plaintiff ordered from the defendants, a firm of coal merchants, one ton of 'Coalite', a household fuel. The 'Coalite' was duly delivered. Some months later when a bucketful of this fuel was put on the fire, an explosion occurred in the grate, and a thick cloud of black smoke, accompanied by a shower of embers, issued into the room causing considerable damage. The explosion was due to a detonator which had found its way into the 'Coalite'.

The plaintiff failed to recover under section 14 (1) since the fuel had been sold under its trade-name, but the question of liability under section 14 (2) still remained. Counsel for the defendants ingeniously attempted to argue that the 'Coalite' itself was of merchantable quality; the defect lay in the inclusion of a detonator which was never part of the contract of sale. The Court of Appeal did not feel itself able to accept this argument, and the defendants were held liable.

¹ *Grant v. Australian Knitting Mills*, [1936] A.C. 85; *Bristol Tramways Co. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831.

² [1903] 1 K.B. 610.

³ [1954] 1 Q.B. 598.

(d) Sale by sample

Sale by sample Where the contract of sale is by sample there are implied conditions: (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.¹

Exemption Clauses

Exclusion of implied terms The conditions and warranties implied by sections 12-15 of the Sale of Goods Act may be expressly excluded by the parties if they so wish.² Not unnaturally, therefore, many vendors, both retailers and manufacturers, attempt to exclude their liability under the Act by means of a printed form containing standard conditions of sale. Sometimes this may be couched in the form of a 'guarantee' of an imposing nature which may (though not necessarily) give to the purchaser more extensive rights for a limited period and thereafter none at all. More usually it merely contains an exemption clause, or clauses, which take away the right of the purchaser to rely on the conditions and warranties implied by the Act. We shall deal with these exemption clauses later and in greater detail, but, for the present, let us consider how carefully a vendor must frame his clause in order to obtain the immunity which he seeks to acquire.

(a) Exclusion of warranties does not exclude conditions

Exclusion of warranties If the vendor purports merely to exclude warranties, this will not suffice to exclude conditions. This is illustrated by *Baldry v. Marshall*:³

The plaintiff, who wished to buy a motor-car, approached the defendants, a firm of motor-car dealers, and told them that he wished to buy a car 'suitable for touring purposes'. They recommended a Bugatti car, and so he ordered 'an eight cylinder Bugatti car'. The car was supplied with a guarantee which, if accepted, expressly excluded 'any other guarantee or warranty, statutory or otherwise'. The car was unsuitable for touring purposes and the plaintiff repudiated the contract. In an action for the price, the defendants raised the defence of the exemption clause.

The Court of Appeal held that the fact that he had ordered the car by its trade-name did not exclude the operation of section

¹ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 15.

² *Ibid.*, s. 55.

³ [1925] 1 K.B. 260.

14 (1) of the Sale of Goods Act as he had relied on the vendors' skill or judgment in selecting a car for touring purposes. There was consequently a breach of the condition implied by that subsection and, since the defendants had merely excluded liability for breach of warranty, but not of condition, they were accordingly liable.

Even if the buyer has accepted the goods within section 11 (1) (c) of the Act, so that he can no longer repudiate the contract for breach of condition, but must sue, if at all, for damages for breach of warranty *ex post facto*,¹ exclusion of liability for breach of warranty has no effect. In the leading case of *Wallis, Son & Wells v. Pratt & Haynes*:²

The defendants sold by sample to the plaintiffs seed described as 'common English sainfoin'. The plaintiffs bought subject to an exemption clause that 'the sellers give no warranty express or implied, as to growth, description, or any other matters.' The seed turned out to be giant sainfoin, indistinguishable in seed, but inferior in quality and of less commercial value. Having been forced to compensate those to whom they had subsequently sold the seed, the plaintiffs brought an action to recover the money lost. The defendants pleaded the exemption clause.

It was held by the House of Lords that, even though the plaintiffs had accepted the goods and could therefore only sue as for breach of warranty, there was nevertheless a breach of the *condition* implied by section 13 and this had not been successfully excluded.

(b) *Exclusion of implied terms does not exclude express terms*

It is easy enough to surmount the previous difficulty merely by printing 'all implied conditions and warranties are hereby excluded'. But the exclusion of an implied term does not exclude an express term. So in *Andrews Bros., Ltd. v. Singer & Co., Ltd.*:³

Exclusion
of implied
terms

The plaintiff agreed to purchase from the defendant 'a new 18 h.p. Singer saloon car'. The contract of sale contained the clause 'all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded'. The defendant delivered a car which was not new.

It was held that the promise that the car should be new was an express term of the contract, and since the exemption clause only mentioned implied terms, the defendant was liable.

¹ *Supra*, p. 114.

² [1911] A.C. 394.

³ [1934] 1 K.B. 17.

But this limitation constitutes no serious barrier. In *L'Estrange v. Graucob*,¹ for example, there was a sale of an automatic slot machine for cigarettes. The agreement contained a clause 'any express or implied condition, statement or warranty, statutory or otherwise, not stated herein is excluded'. The slot machine was defective, but it was held that the exemption clause had effectively excluded all liability on the part of the seller. The skill of the draftsman had, it seemed, prevailed over the natural reluctance of the Courts to uphold such an abuse of contractual freedom.

(c) *Fundamental terms*

Funda-
mental
terms In recent years, however, there has emerged a new principle which would seem to offer some escape from even the most carefully drafted exemption clauses. This is the principle of the 'fundamental term' or 'fundamental breach'. There are, it is said, in every contract certain terms which are fundamental, the breach of which amounts to a complete non-performance of the contract. Such terms are more than mere warranties or conditions and cannot therefore be excluded by means of exemption clauses.²

The concept of a fundamental term is not a new one. In 1838, for example, Lord Abinger said: 'If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it.'³ This same principle is particularly applicable to the case of goods sold by description, for the delivery of goods which do not correspond with the description may, if there is a sufficient disparity between the goods sold and those delivered, amount to a non-performance of the contract. Thus in *Pinnock Brothers v. Lewis and Peat, Ltd.*:⁴

The plaintiffs contracted to buy and the defendants to sell one hundred bags of copra cake. The contract was made subject to an arbitration clause with a time limit. There was also a clause which stated: 'the goods are not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination, any statute or rule of

¹ [1934] 2 K.B. 394; *infra*, p. 140.

² Cf. Melville (1956), 19 Mod. L.R. 26.

³ *Chanter v. Hopkins* (1838), 4 M. & W. 399, at p. 404.

⁴ [1923] 1 K.B. 690.

law to the contrary notwithstanding'. The copra cake contained so great an admixture of castor beans as to render it dangerous to cattle.

It was held that neither the arbitration clause nor the warranty clause could operate to exclude the liability of the defendants as they had delivered a substance quite different from that contracted for by the plaintiffs. Similarly in the case of defects in the title of the seller, if a person sells goods which are not his to sell, he has not performed the contract and there is a failure of a fundamental term. In *Rowland v. Divall*:¹

The plaintiff bought a motor-car from the defendant for £334. He was a motor-car dealer, and he re-sold the car to a customer for £400. It later appeared that the car had been stolen, and the police took possession of it on behalf of the true owner. The plaintiff refunded the purchase price to the customer, and then brought an action to recover the £334 paid to the defendant.

The Court of Appeal held that, even though the plaintiff had some use from the car between the time of sale and resale, there had been a total failure of the consideration contracted for and he was entitled to recover the amount. From this case, it is clear that no exemption clause could exclude the obligation of the seller to convey a good title to the goods sold.

What constitutes a fundamental term of a contract for the sale of goods has never been precisely defined. It has been said to be 'something which underlies the contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates'.² It might be thought convenient, for example, to draw a distinction between *substance* and *attributes*, and to say that, although the delivery of a material different in substance (e.g. beans for peas) will amount to a breach of a fundamental term, the delivery of a substance not complying in its attributes (e.g. an old Singer car for a new Singer car) with the contractual description will only amount to a breach of warranty or condition. But to this classification there are serious objections. In the first place, the parties themselves may regard a certain attribute as fundamental to the contract, e.g. ordinary glass for 'safety' glass. Secondly, the distinction between substance and attributes is purely linguistic and has given rise to the liveliest controversy not only between lawyers, but also between philosophers, in both the

Attempts
to define
a funda-
mental
term

¹ [1923] 2 K.B. 500.

² *Smeaton Hanscomb & Co., Ltd., v. Sassoon I. Setty, Son & Co. (No. 1)*, [1953] 1 W.L.R. 1468, *per* Devlin J. at p. 1470.

ancient and modern world.¹ If there is a sale of mahogany logs, and pinewood logs are delivered, is the 'substance' contracted for wood, or logs, or mahogany?² This false distinction has left a deleterious mark in several branches of the law of contract: in mistake,³ in the problem of continuing identity and *specificatio* in Roman law,⁴ and in frustration.⁵ The cases do not, however, support its application in the case of a fundamental term.⁶ This can only be found by reference to the circumstances of the particular contract and the materiality or otherwise of its several provisions.

III. WRITTEN CONTRACTS

Where the parties to a contract have reduced the terms of their agreement to writing, the contract is dealt with according to special rules when it comes before the Courts in litigation. In this section we shall consider how such a contract may be proved; how far, when proved to exist in writing, the terms of the contract may be modified by evidence extrinsic to that which is written; what canons of construction are adopted to ascertain their meaning; and the effect which his signature has upon a party who signs a written agreement.

Admissibility of Oral Evidence

Provinces
of Court
and Jury

If a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. If a jury found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the Court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said.

¹ See Glanville Williams, *Language and the Law*, iii (1945), 61 L.Q.R. 293.

² *Smeaton Hanscomb & Co., Ltd. v. Sassoon, I. Setty, Son & Co. (No. 1)*, [1953] 1 W.L.R. 1468.

³ *Kennedy v. Panama Royal Mail Co.* (1867), L.R. 2 Q.B. 580, *infra*, p. 249; *Taylor* (1948), 11 Mod. L.R. 257; Dig. 18.1.9.2.

⁴ Justinian, *Institutes*, II. 1. 25.

⁵ *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683.

⁶ *Farley v. Whipp*, [1900] 1 Q.B. 513, *per* Channell J. at p. 516.

The same rule applies to contracts made in writing. When the parties have put into writing any part of their contract they cannot alter by oral evidence that which they have written. When they have put into writing the whole of their contract they cannot add to or vary it by oral evidence. In this chapter we are concerned to ascertain the circumstances under which extrinsic oral evidence is admissible in relation to written contracts and contracts under seal. Such evidence is of three kinds:

1. Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.
2. Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some oral condition upon which its existence as a contract depends.
3. Evidence as to the terms of the contract. These may be incomplete, and may need to be supplemented by oral proof of the existence of other terms; or they may be ambiguous and then may be in like manner explained; or they may be affected by a usage the nature of which has to be proved.

We must note that a difference, suggested some time back,¹ between contracts under seal and simple contracts, is illustrated by the rules of evidence respecting them. A contract under seal derives its validity from the form in which it finds expression; therefore if the instrument is proved, the contract is proved, unless it can be shown to have been executed under circumstances which preclude the formation of a contract, or to have been delivered under conditions which have remained unfulfilled, so that the deed is no more than an escrow. Deed is the contract

But a written contract not under seal is not the contract itself, but only evidence, the record of a contract.² Even where statutory requirements for writing exist, as in the case of contracts for the sale of land or contracts of guarantee, the writing is no more than evidentiary of a previous or contemporaneous agreement. A written offer containing all the terms of the contract, signed by the party to be charged, and accepted by performance on the part of the offeree, is enough to enable the offeree to sue in such circumstances. And where there is no such necessity for writing, it is optional to the parties to express their agreement by word of mouth, by acts, or by but writing only evidentiary

¹ *Supra*, p. 63.

² *Wake v. Harpur* (1861), 6 H. & N. 768, affirmed (1862), 1 H. & C. 202.

writing, or partly by one, and partly by another, of these processes.

It is always possible, therefore, that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it. 'They put on paper what is to bind them, and so make the written document conclusive evidence between them.'¹

(a) *Proof of a document*

Proof of contract under seal A contract under seal is proved by evidence of the signature, sealing, and delivery. Formerly, where a document under seal was attested, it was necessary to call one of the attesting witnesses, but now by statute this is no longer required.²

and of simple contract In proving a simple contract oral evidence is necessary to show that the party sued is the party making the contract and therefore bound by it. In practice, however, a notice to admit is normally given by one party to the other, and the party to whom the notice is given admits the document to have been

Supplementary oral evidence where contract written only in part executed by him.³ Oral evidence must also be given to supplement the writing where the writing only constitutes a part of the contract. For instance: *A*, in Oxford, writes to *B* in London, 'I will give you £50 for your horse; if you accept, send it by next train to Oxford.' To prove the conclusion of the contract, it would be necessary to prove the dispatch of the horse. And if an offeror puts the terms of an agreement into a written offer which the offeree accepts by word of mouth; or if he puts a part of the terms into writing and arranges the rest orally with the offeree, oral evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of the offeree.⁴ But again, where the existence of the contract is not disputed, these matters, too, will be admitted in the preliminary stages of the action.

or where connexion of parts does not appear from documents Where a contract consists of several documents which need oral evidence to show their connexion, such evidence may be given to connect them. This rule needs some qualification as regards contracts for the sale of land⁵ or contracts of guarantee⁶ for which statute requires a written memorandum. The docu-

¹ *Wake v. Harrop* (1861) 6 H. & N. 768, at p. 775.

² Evidence Act, 1938 (1 & 2 Geo. VI, c. 28), s. 3.

³ R.S.C., Order xxxii.

⁴ *Harris v. Rickett* (1859), 4 H. & N. 1.

⁵ Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), s. 40 (1); *supra*, p. 69.

⁶ Statute of Frauds, 1677 (29 Car. II, c. 3), s. 4; *supra*, p. 66.

ments must, in such a case, contain a reference, in one or both, to the other, in order to admit oral evidence to connect them.¹ In contracts other than these, evidence would seem to be admissible without any such internal reference. 'I see no reason', said Brett J.,² 'why parol evidence should not be admitted to shew what documents were intended by the parties to form an alleged contract of insurance.'

There are circumstances, such as the loss or inaccessibility of the written contract, in which oral evidence of the contents of a document is allowed to be given, but these are part of the general law of evidence, and the rules which govern the admissibility of such evidence are best studied in the particular treatises on that subject.

(b) *Evidence as to the fact of agreement*

So far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the Court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement. It may be shown by such evidence that the contract was invalid for want of consideration, for illegality, or because of the incapacity of one of the parties, or that it was void or voidable for fraud, misrepresentation, or mistake. Extrinsic evidence is used here, not to alter the purport of the agreement, but to show that there never was such an agreement as the law would enforce.

It may also be shown by extrinsic evidence that an oral agreement suspended the operation of the contract. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an escrow, and the terms upon which it is delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

Evidence of condition suspending operation of contract by deed

In like manner the parties to a written contract may agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative. In a case previously mentioned, *Pym v. Campbell*,³ a written contract for the purchase of a share in the proceeds of an invention was made subject to an oral condition that the contract was not to become binding until the approval of a third party, one Abernethie, was obtained. This approval was never given. The

of a simple contract

¹ *Long v. Millar* (1879), 4 C.P.D. 450, at p. 456; *supra*, p. 73.

² *Edwards v. Aberayron Insurance Society*, [1876] 1 Q.B.D. 563, at p. 588.

³ (1856), 6 E. & B. 370, *supra*, p. 110.

Court of Queen's Bench allowed oral evidence of the condition to be admitted on the ground thus stated by Erle J.:¹

The point made is that this is a written agreement absolute on the face of it, and that evidence was admitted to shew it was conditional: and if that had been so it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible.

Fresh
contract

It is also possible for the parties subsequently to agree to make a fresh contract, and thus orally to rescind or modify their previous written agreement. This rule is, however, a rule relating to the discharge of a contract,² and is quite distinct from the present principle which relates to evidence of the formation of an agreement.

(c) Evidence as to the terms of a contract

Evidence
as to terms

When we come to extrinsic evidence as affecting the terms of a contract, the admissibility of such evidence is narrowed to a small compass; for 'according to the general law of England the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties'.³ This rule is illustrated by *Henderson v. Arthur*:⁴

The plaintiff leased to the defendant a theatre, the defendant covenanting in the lease to pay the sum of £2,500 p.a. quarterly in advance. This covenant would mean that the rent was to be paid in cash, but the parties agreed orally that the defendant should be allowed to pay by a bill, payable at three months. The defendant tendered a bill which the plaintiff refused to accept, and, when sued by the plaintiff for the rent, pleaded that he had already paid in accordance with the oral agreement.

The Court of Appeal held that the oral agreement contradicted the terms of the written lease and was therefore inadmissible in evidence.

¹ *Pym v. Campbell* (1856), 6 E. & B. 370, at p. 373. ² *Infra*, p. 399.

³ *Burges v. Wickham* (1863), 3 B. & S. 669, per Blackburn J., at p. 696.

⁴ [1907] 1 K.B. 10; *Mercantile Bank of Sydney v. Taylor*, [1893] A.C. 317.

There are, however, a number of exceptions to this rule ^{Exceptions} which tend to mitigate some of the injustices which might otherwise occur.

In the first place, if the parties to a contract have not put all its terms into writing, evidence of the supplementary terms is ^{(i) Evidence of supplementary terms} admissible, not to vary but to complete the written contract. In *Robb v. Green*:¹

The plaintiff by certain letters purporting to contain 'the exact terms of the hiring' offered to engage the defendant as his farm manager. The only terms contained in the letters related to the defendant's salary and the rent of his house. The defendant accepted the offer. The question subsequently arose whether the plaintiff should be permitted to prove a previous oral term by which he stipulated that the defendant should not divulge any trade secrets learnt during his employment.

It was held that neither of the parties could have supposed that the letters contained all the terms of the agreement, and so oral evidence would be admitted to prove the previous stipulation.

Again, evidence may be given of a verbal agreement ^{or collateral terms} collateral to the contract proved, although a term thus introduced must not be contrary to its tenor. In *Erskine v. Adeane*,² a farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down; he was held entitled to compensation for damage done to his crops by a breach of the verbal promise, though no reference to it appeared in the terms of the lease. Mellish L.J. thus explained the rule:³

No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself.

But in *Angell v. Duke*⁴ evidence of an oral promise by a landlord to send in more furniture was held inadmissible as it was inconsistent with the written agreement to let a house 'and the furniture therein'.

¹ [1895] 2 Q.B. 1, affirmed [1895] 2 Q.B. 315.

² (1873), 8 Ch. App. 756; *Jameson v. Kinnell Bay Land Co., Ltd.* (1931), 47 T.L.R. 593; *Morgan v. Griffith* (1871), L.R. 6 Ex. 70; *De Laisalle v. Guildford*, [1901] 2 K.B. 215.

³ At p. 766.

⁴ (1875), L.R. 10 Q.B. 174.

(ii) Ex-
planation
of
terms to
identify
parties
Secondly, evidence in explanation of terms may be evidence of the identity of the parties to the contract, as where two persons have the same name,¹ or where an agent contracts in his own name but on behalf of a principal whose name or whose existence he does not disclose.²

or subject-
matter
Or it may be a description of the subject-matter of the contract: *A* agreed to buy from *B* certain wool which was described as 'your wool'; the right of *B* to bring evidence as to the quality and quantity of the wool was disputed. The Court held that the evidence was admissible.³

or to show
application
of phrases
Or such evidence may be an explanation of some word not describing the subject-matter of the contract but the nature of the responsibility which one of the parties assumes in respect of the conditions of the contract. Where a vessel is warranted 'seaworthy', a house promised to be kept in 'tenantable' repair, a thing undertaken to be done in a 'reasonable' manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties. In *Burges v. Wickham*, for example:⁴

A vessel, called the *Ganges*, intended for river navigation upon the Indus, was sent on the ocean voyage to India, temporarily strengthened to meet the perils of such a voyage. She was insured, and in every voyage policy of marine insurance there is an implied warranty by the assured that the ship is 'seaworthy'. The *Ganges* was not seaworthy in the sense in which that term was usually applied to an ocean-going vessel, but the underwriters knew the nature of the vessel, and though the adventure necessarily was more dangerous than the voyage of an ordinary vessel, she was made as seaworthy as a vessel of her type could reasonably be made. The underwriters took the risk at a higher premium than usual, and with full knowledge of the facts. The *Ganges* was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy for the purpose of an ocean voyage.

On the question whether evidence should be admitted to show that, with reference to this particular vessel and voyage, 'seaworthiness' was understood in a modified sense, it was held that such evidence was admissible on the grounds stated by Blackburn J.:⁵

It is always permitted to give extrinsic evidence to apply a written contract, and shew what was the subject-matter to which it refers. When

¹ *Doe d. George Gord v. Needs* (1836), 2 M. & W. 129.

² *Viz. infra*, ch. xix.

³ *Macdonald v. Longbottom* (1859), 1 E. & E. 977, affirmed (1860), 1 E. & E. 987.

⁴ (1863), 3 B. & S. 669.

⁵ At p. 698.

the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles' or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant, for that which would be repair in a house of the one class is not so when applied to a house of the other.

In each of these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure; it is to be understood, not *simpliciter*, but *secundum quid*.

Cases such as we have described are cases of *latent ambiguity* Latent and
patent
ambiguity not apparent upon the face of the contract, and they must be carefully distinguished from *patent* ambiguities, where words are omitted, or contradict one another; for in such cases explanatory evidence is generally not admissible. Thus in a well-known case¹ where *A* bought goods of *B* 'ex *Peerless* from Bombay' evidence was admitted to show that there were two ships of that name, and that each party intended a different ship; but if, for example, the name of a piece of property to be sold were inadvertently left blank, it would not be possible to introduce extrinsic evidence to show what both of the parties had in mind.²

Thirdly, the usage of a trade or locality may be proved, and by such evidence a term may be annexed to a written contract, or a special meaning may be attached to some of its provisions. Oral evidence of a usage which adds a term to a written contract is admissible on the principle that 'there is a presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages'.³ (iii) Usage
admissible

By way of illustration of a commercial usage we may take the warranty of seaworthiness which is always held to be implied in a voyage policy of marine insurance though not specially mentioned;⁴ and for a local usage we might take an implied

¹ *Raffles v. Wichelhaus* (1864), 2 H. & C. 906; *infra*, p. 255.

² *Baylis v. Attorney-General* (1741), 2 Atkyn 239.

³ *Hutton v. Warren* (1836), 1 M. & W. 466, *per* Parke B. at p. 475; *Wigglesworth v. Dallison* (1779), Doug. 201; *Brown v. Byrne* (1854), 3 E. & B. 703.

⁴ *Burges v. Wickham* (1863), 3 B. & S. 669.

term that a tenant is to farm in accordance with the particular course of husbandry in that locality.¹

Oral evidence of a usage to explain phrases in contracts, whether commercial, agricultural, or otherwise subject to known customs, is admissible on the principle that 'in such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it, by expounding the language'.² Thus in a charter-party in which the days allowed for unloading the ship are to commence running 'on arrival' at the ship's port of discharge, if by custom 'arrival' is understood to mean arriving at a particular spot in the port, evidence may be given to show what is commonly understood by 'arrival' at the port.³ And where the lessee of a rabbit warren covenants that he will leave 10,000 rabbits on the warren, oral evidence is admissible to show that, by local custom, 1,000 means 1,200.⁴

But, as in the case of terms implied into a contract by custom or usage, any such interpretation must be notorious, certain, and reasonable.⁵ It must also not conflict with the express terms so as to produce an obvious inconsistency. Thus in *Palgrave, Brown & Son, Ltd. v. S.S. 'Turid'*:⁶

A charter-party provided that a vessel should deliver cargo 'always afloat', the cargo to be 'taken from alongside the vessel at charterers' risk and expense as customary'. The vessel could not lie 'always afloat' nearer than thirteen feet from the quay, and the custom of the port was to erect a wooden staging over which the cargo was carried at the shipowner's expense and deposited on the quay some feet from the water's edge. This was done, and the shipowner brought an action for the difference between the cost of discharging in this manner and the cost of delivery at the ship's rail.

If the custom of the port were applicable in its entirety, the shipowners would fail, since the special method of unloading the cargo would be at their expense. But this custom was inconsistent with the express words of the charter which required the charterers to take delivery from alongside the vessel at their own expense. The House of Lords accordingly held that the custom afforded no defence to the action.

It is clear, however, that a usage does add something to a written contract, and in that sense does vary it. The true test

¹ *Hutton v. Warren* (1836), 1 M. & W. 466.

² *Brown v. Byrne* (1854), 3 E. & B. 703, per Coleridge J. at p. 716.

³ *Norden Steam Co. v. Dempsey* (1876), 1 C.P.D. 654.

⁴ *Smith v. Wilson* (1832), 3 B. & Ad. 728.

⁵ Viz. *supra*, p. 119.

⁶ [1922] A.C. 397.

whether it is inconsistent with, or repugnant to, what is written is to be found by asking the question whether what is added by the usage 'is such as *if expressed in the written contract* would make it insensible or inconsistent'.¹

Fourthly, oral evidence of a contract is not excluded by the fact that a written memorandum of it was made, if the writing was not, in fact, the contract itself, but only a note or record of it. In *Allen v. Pink*:²

The defendant sold to the plaintiff a horse, and orally warranted it to be quiet in harness. He also gave the plaintiff the following receipt:— 'Bought of G. Pink, a horse for the sum of £7 2s 6d. G. Pink.' The horse proved vicious and the plaintiff sued for the return of the price, relying on the oral warranty.

It was held that oral evidence was admissible to establish the warranty, as the agreement itself had not been reduced to writing and the receipt was only a memorandum of it.

Finally, in the application of equitable remedies such as the grant or refusal of specific performance,³ the rectification of documents,⁴ or their cancellation,⁵ extrinsic evidence is more freely admitted. It is, for example, possible to show by such evidence that the offer was made by inadvertence and not accepted in good faith,⁶ or that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly.⁷ In the latter case, the Court may order the rectification of the written instrument to bring it into line with the parties' true intent.⁸ This is so even though the contract is one which is required by statute to be under seal or to be proved by written evidence, as in the case of contracts for the sale of land;⁹ for 'when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the Court to rectify being outside the prohibition of the statute'.¹⁰

¹ *Humfrey v. Dale* (1858), 7 E. & B. 266, per Lord Campbell C.J. at p. 275.

² (1838), 4 M. & W. 140.

³ *Infra*, p. 267.

⁴ *Infra*, p. 268.

⁵ *Infra*, p. 270.

⁶ *Webster v. Cecil* (1861), 30 Beav. 62; *Garrard v. Frankel* (1862), 30 Beav. 445; *Paget v. Marshall* (1884), 28 Ch. D. 255; *infra*, p. 267.

⁷ *Craddock Bros. v. Hunt*, [1923] 2 Ch. 136, *infra*, p. 269.

⁸ The Judicature Act assigns to the Chancery Division of the High Court a jurisdiction 'in all causes for the rectification, or setting aside, or cancellation of deeds or other written instruments' (36 & 37 Vict., c. 66, s. 34).

⁹ *Supra*, p. 69.

¹⁰ *United States v. Motor Trucks, Ltd.*, [1924] A.C. 196, per the Earl of Birkenhead at p. 201 (dealing with the now repealed s. 4 of the Sale of Goods Act, 1893).

Construction of Written Contracts

Construction of a contract is a question of law

We have so far considered the mode in which the terms of a contract are ascertained; we have now to deal shortly with certain general principles which govern the construction of contracts which have been reduced to writing, premising that the construction of a contract is always a matter of law for the Court to determine.

Intention must be ascertained from document itself

The professed object of the Court in construing a written contract is to discover the intention of the parties, the written declaration of whose minds it is. But this intention must be ascertained from the document itself; it is not permissible to go outside the words there set down, and to substitute for these a guess as to what the parties might have intended in the circumstances. This basic principle is clearly illustrated by *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*¹

The plaintiffs were film distributors and the defendants were owners of a chain of cinemas. In 1941 the plaintiffs contracted to supply the defendants with films, the contract permitting either party to terminate the contract by giving four weeks notice. In 1943 a government order restricted the supply of film, and, in order to safeguard their position, the parties entered into a supplementary agreement in which it was provided that 'the principal agreement shall remain in full force and effect *until such time as the order is cancelled*'. It might have been expected that, when the war came to an end in 1945, the order would have been abrogated immediately, but this was not the case and it was continued in force for quite different reasons than those of national safety. In 1948, the defendants gave four weeks notice, in accordance with the original agreement, to terminate the contract. The plaintiffs refused to accept this notice as valid, and sued for breach of contract, the order still being in force.

In the Court of Appeal the judges were prepared to go outside the literal words of the contract and to read it in the light of the parties' presumed intention that the supplementary agreement was to endure only as long as war-time conditions persisted. The continuance of the order beyond that period was quite un contemplated by the parties, and the defendants should be relieved from liability. In the House of Lords, however, the orthodox principle of construction was restated. It was the duty of the Courts to ascertain the intention of the parties from the document itself, and not to rewrite it in the light of what the parties might (or might not) have had in mind at the time they

¹ [1952] A.C. 166 (heard in the Court of Appeal at [1951] 1 K.B. 190).

made the contract. The words of the agreement were clear and unequivocal and the defendants were bound by them.

There are certain other rules of a general nature which are applied by the Courts in the case of written agreements:

Rules of
construction
Literal
rule

1. Words are to be understood in their plain and literal meaning. This does not necessarily mean the dictionary sense of the word, but that in which it is generally understood,¹ subject always, however, to admissible evidence being adduced to show that the word is to be understood in some other technical or peculiar sense.

2. Words susceptible of two meanings receive that which will make the instrument valid rather than void or ineffective.² Where a document was expressed to be given to the plaintiffs 'in consideration of your *being* in advance' to J. S., it was argued that this showed a past consideration; but the Court held that the words might mean a prospective advance, and be equivalent to 'in consideration of your *becoming* in advance', or '*on condition* of your being in advance'.³

*Ut res
magis
valeat
quam
pereat*

3. 'An agreement ought to receive that construction which will admit, and will best effectuate the intention of the parties, to be collected *from the whole of the agreement*; greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.'⁴ The proper mode of construction is to take the instrument as a whole, to collect the meaning of words and phrases from their general context, and to try to give effect to every part of it.⁵

Instrument
must be
construed
as a whole

Subsidiary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties as ascertained from the written document.

Subsidiary
rules

Obvious mistakes in writing and grammar will be corrected by the Court.

Mistakes

The meaning of general words may be narrowed and restrained by specific and particular descriptions of the subject-matter to which they are to apply. Thus in construing a charter-party where liability to deliver cargo was excluded if through 'war, disturbance, or any other cause' it was not possible to do so, it was held that the words 'any other cause'

*Ejusdem
generis* rule

¹ *Robertson v. French* (1803), 4 East 130, at p. 135.

² The rule is summed up in the maxim *ut res magis valeat quam pereat*.

³ *Haigh v. Brooks* (1839), 10 A. & E. 309.

⁴ *Ford v. Beech* (1848), 11 Q.B. 852, *per* Parke B. at p. 866.

⁵ *Barton v. Fitzgerald* (1812), 15 East 529, at p. 541.

were restricted to events of the same kind as war and disturbance, and so excluded ice.¹ But this rule (the so-called *ejusdem generis* rule) is again only a canon of construction for the purpose of ascertaining what may be presumed to have been the meaning and intention of the parties to the contract. It is not a rule of law and is therefore subordinate to the parties' real intention and does not control it; and it will have no application if the parties, from a survey of the contract as a whole, can be shown to have intended a different interpretation to be given to the language which they have used.

Verba chartarum fortius accipiuntur contra proferentem Words are construed more strongly against the party using them.² The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

Signed Documents

Effect of signature: party bound The general rule is that when a document containing contractual terms is signed by one party to the contract, that party is bound by the terms even though he has not read them and even though he is ignorant of their precise legal effect.

This principle might be summed up in the maxim *caveat subscriptor*. In *L'Estrange v. Graucob*, for example:³

The plaintiff, the owner of a café, agreed to buy from the defendants an automatic slot-machine for cigarettes. The agreement was to pay by instalments, and it contained an exemption clause excluding liability for breaches of warranty or condition. The plaintiff signed the agreement without reading its terms. The machine proved faulty, and the plaintiff purported to terminate the contract for breach of condition.

It was held that she could not do so, as she was bound by the terms of the document which she had signed.

Exceptions To this rule there are, however, two exceptions: (a) the defence of *non est factum*, and (b) where the party signing is induced to do so by fraud, or by a misrepresentation as to the nature, contents, or effect of the document signed.

¹ *Tillmans v. S.S. Knutsford*, [1908] 2 K.B. 385, affirmed [1908] A.C. 406; *Thorman v. Dowgate Steamship Co., Ltd.*, [1910] 1 K.B. 410.

² The rule *verba chartarum fortius accipiuntur contra proferentem*. *Fowkes v. Manchester and London Assurance and Loan Association* (1863), 3 B. & S. 917, at p. 929; viz. *infra*, p. 153.

³ [1934] 2 K.B. 394.

(a) *Non est factum*

The common law defence of *non est factum* permits one who *Non est factum* has executed a written document in ignorance of its character to plead that, notwithstanding the execution, 'it is not his deed' in contemplation of law.¹ The term properly applies to a deed, but it is equally applicable to other written contracts.

In order for the defence to succeed the party executing the document must show that he was mistaken not merely as regards the contents, but as to the essential nature of the contract. In *Howatson v. Webb*:² *Mistake as to contents of document insufficient*

The defendant was a clerk in the employment of a solicitor, one Hooper. Hooper was engaged in certain building speculations in land at Edmonton, and, for this purpose, plots had been taken in the name of the defendant purely as Hooper's nominee. The defendant left Hooper's service, and Hooper asked him to sign some deeds relating to the Edmonton property. When asked what these were, Hooper replied 'They are just deeds transferring that property' (i.e., as it seemed, to himself). The defendant signed without reading the deeds, but they were actually a mortgage of property for £1000, of which the plaintiff became transferee in good faith. When sued, the defendant raised the plea of *non est factum*.

It was held that the plea was of no avail, as the deed in question was not of a character so wholly different from that which it was represented to be. The defendant knew that it dealt with some kind of transfer of property, and a misrepresentation as to contents was insufficient. This case is probably an extreme one, and a more typical example is that of *Blay v. Pollard & Morris*,³ where the defendant had signed a document which he knew to relate to a dissolution of a partnership of which he was a member, but to one of the terms of which he objected as not carrying out a previous oral agreement. It was held that he was bound, as the mistake was merely as to the terms of the written document.

Where, however, a party is induced by his mistake to execute a written contract of a character entirely different from that which he intends to sign, the defence of *non est factum* is available; the contract is entirely void, into whosoever hands it may come. The only cases furnished in the reports are cases in which by the fraud of a third party the promisor has been mistaken as to the nature of the contract into which he was *Mistake as to nature of document avoids*

¹ *Scriptum predictum non est factum suum*. See Fifoot, *History and Sources of the Common Law (Tort and Contract)*, pp. 232, 248.

² [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1.

³ [1930] 1 K.B. 628.

entering, and the person seeking to enforce the instrument has in consequence been led to believe in the intention of the promisor to contract when he did not so intend. Yet the fraud is, strictly, immaterial:

. . . it [the signature] is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.¹

In an old case, *Thoroughgood's Case*,² an illiterate man executed a deed, which was described to him as a release of arrears of rent; in fact, it was a release of all claims. The deed was not read to him, but when told that it related to arrears of rent, he said, 'If it be no otherwise, I am content', and executed the deed. It was held that the deed was void as he never intended to contract.

Illustrations

We must now examine the more modern cases in which the plea of *non est factum* has been successful. The first is that of *Foster v. Mackinnon*:³

Mackinnon, 'a gentleman far advanced in years', was fraudulently induced to indorse a bill of exchange for £3,000 on the assurance that it was a guarantee of a similar nature to one which he had previously signed. Later the bill was indorsed for value to Foster, who took it in good faith.

It was held that the defence of *non est factum* was available to Mackinnon, as he never intended to make such a contract, and had been guilty of no negligence. 'It was', said Byles J.,⁴ 'as if he had written his name . . . in a lady's album, or on an order for admission to the Temple Church, or in the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange . . . on the other side of the paper.'

In *Lewis v. Clay*:⁵

Lord William Nevill came to the defendant and asked him to witness some deeds for him. He produced a roll of papers covered by blotting paper, in which there were cut four openings, and explained that it was 'a private matter'. Believing that he was witnessing Lord Nevill's signature, the defendant signed in the spaces indicated. It turned out that the papers were promissory notes to the value of £11,000 made out in favour of the plaintiff who took them in good faith and for value.

¹ *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704, per Byles J. at p. 711.

² (1584), 2 Co. Rep. 9a.

⁴ At p. 712.

³ (1869), L.R. 4 C.P. 704.

⁵ (1898), 67 L.J.Q.B. 224.

The jury found that the defendant had signed in misplaced confidence, but without negligence; and Lord Russell C.J. held that he was not liable because 'his mind never went with the transaction', but was 'fraudulently directed into another channel by the statement that he was merely witnessing a deed or other document'.

It will be observed that in neither of these cases had the party deceived contributed to his deception by his own negligence. The question was, therefore, strictly left open whether the plea of *non est factum* would avail one who is in fact deceived as to the character of the document which he executes, but who is negligent in not informing himself of it. The contention is that a person who is neither illiterate nor blind, and who negligently executes a contractual document, will be estopped from availing himself of the plea of *non est factum* against one who acts on the faith of the document being valid. Certainly it might be thought reasonable that if one of two innocent parties in such a case is to suffer for the fraud of a third, the sufferer should be the one whose negligence has contributed to the loss suffered. In both *Foster v. Mackinnon* and *Lewis v. Clay* the question of negligence was put to the jury, and although the jury answered in the negative, the question was upheld as proper and relevant by the court *in banc*.

Effect of
negligence
of party
signing

This, however, is not the view which the Court of Appeal subsequently took in the case of *Carlisle and Cumberland Banking Co. v. Bragg*:¹

Rigg asked Bragg to sign a document telling him that it referred to some insurance matter about which they had already been doing business together. Bragg signed without reading it, and it turned out to be a guarantee of Rigg's overdraft with the plaintiff bank. The bank allowed Rigg to overdraw on the faith of Bragg's supposed guarantee.

The jury found that Bragg had been induced to sign the guarantee by the fraud of Rigg, that he did not know that it was a guarantee, but that he was negligent in signing it. On these findings the Court of Appeal nevertheless held that Bragg was not liable on the guarantee, his negligence being immaterial as he owed no duty to the plaintiffs. The Court distinguished *Foster v. Mackinnon* and *Lewis v. Clay* on the ground that those were cases concerning negotiable instruments, and negotiable instruments are exceptions to this rule, for the maker, acceptor,

¹ [1911] 1 K.B. 489; followed *Prudential Trust Co. v. Clugnet* (1956), 5 D.L.R. (2d) 1 (Canada).

or indorser of a negotiable instrument owes a duty to every subsequent *bona fide* holder for value. He is therefore liable on the instrument unless he can show not merely that his mind did not go with his signature, but that no negligence on his part contributed to his mistake. In all other cases, however, negligence on the part of the party signing does not affect his liability in any way.

It is not easy to regard the state of the law on the defence of *non est factum* as satisfactory. It contains two distinctions which are difficult to justify. In the first place we have the distinction between mistake as to the essential nature or character of the document and mistake as to its contents; in the former the plea of *non est factum* is admitted and the apparent contract is void however negligent the person signing the document may have been, whereas in the latter the plea is not admitted, and the person signing may be estopped from denying his signature. The distinction between character and contents is perhaps intelligible in the abstract,¹ but in practice it leads to different decisions in cases which common sense seems to suggest ought to be governed by the same rule. In *Howatson v. Webb*, Webb had no thought of mortgaging property or incurring a debt; in *Carlisle Banking Co. v. Bragg*, Bragg had similarly no thought of giving a guarantee; yet because Webb knew that the document related to the property to which it actually did relate (though he thought it dealt with that property in a way totally different from that in which it did deal with it), whereas Bragg thought that his document related to something quite different from a guarantee, Webb was bound and Bragg was not.

Secondly, in those cases where the mistake relates to the whole character of the document and the plea of *non est factum* is therefore *prima facie* admitted, we have a distinction between negotiable instruments and other documents, on the ground that a duty is owing to persons into whose hands a negotiable instrument (but not any other document) may come. The effect of this distinction is somewhat remarkable. If it was a negotiable instrument that the party charged was fraudulently induced to sign, then he will be liable if negligent; but if it turns out to be some other transaction, he will not incur any liability. Since he is ignorant of its true nature in either case, the question of liability or no liability depends upon the operation of chance, or at any rate upon the choice of the fraudulent party.

¹ Cf. Glanville Williams (1945), 61 L.Q.R. 194, who denies even this.

But *non est factum* means that in the eye of the law a man has not executed a document to which as a physical fact he has affixed his signature, and it is difficult to see how a man can be under any duty to persons into whose hands a document which *ex hypothesi* is not his act, may come, or how it can make any difference in this respect whether such a document purports to be a negotiable instrument or something else. It seems unfortunate that the plea of *non est factum* has not been restricted to the case of persons who are blind or illiterate as was suggested by the Court of Appeal in *Howatson v. Webb*; and that the rule that negligence excludes a plea of *non est factum* in the case of negotiable instruments has not been extended to all written contracts, as indeed was supposed to be the law before the decision in *Carlisle Banking Co. v. Bragg*.

(b) *Fraud or misrepresentation*

If the party executing a document is induced to sign by reason of fraud or misrepresentation as to the nature, contents, or legal effect of the document signed, by the other party to the contract, he is entitled to rescind as against that other party. Effect of fraud

It is not necessary that the fraud or misrepresentation should go to the root of the contract, as in the case of the defence of *non est factum*, provided that it is material to the issue, and affected the mind of the person executing the document. In *Moorhouse v. Wolfe*:¹

The defendant advertised in a newspaper that he would lend money 'on easy terms without securities' to all respectable persons, both male and female. The plaintiff, a farmer, went to the defendant's office where the same notice 'money on easy terms' was written on the door. In order to secure an advance, he signed a bill of sale over his furniture and other movable property, and promised to repay the sum borrowed with interest which, when calculated, amounted to some 125%. He subsequently brought an action to set aside the bill of sale.

It was held that the defendant had falsely represented that he was lending money on easy terms, when the contrary was the case, and that this misrepresentation had induced the plaintiff to sign the bill of sale. The Court ordered the bill to be delivered up.

Moreover, the fraudulent or misrepresenting party cannot rely on the terms of a written contract in the face of his misrepresentation. So in *Curtis v. Chemical Cleaning and Dyeing Co.*:²

¹ (1882), 46 L.T. 374.

² [1951] 1 K.B. 805.

The plaintiff took to the defendants' shop a white satin wedding dress for cleaning. She was asked to sign a receipt which contained a clause exempting the defendants from all liability for damage to articles cleaned. The plaintiff asked the defendants' servant why her signature was required and was told that the defendants would not accept liability for certain specified risks, including damage to the beads and sequins on the dress. When it was returned, the dress was badly stained.

The Court of Appeal held that, as the plaintiff had been induced to believe that the clause only referred to the beads and sequins, the defendants were not entitled to rely on it in respect of damage by staining, and were accordingly liable. Denning L.J., dealing with the question of exemption clauses generally, said:¹

any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough.

It should be noted, however, that the effect of fraud or misrepresentation is not to render the contract void *ab initio*, but voidable. It is therefore not possible, as in the case of *non est factum*, to set up these defences against a third party seeking to enforce the document if he has taken it *bona fide* and for value. It will be remembered that in *Howatson v. Webb*,² despite the fraud on the part of the solicitor, Hooper, it was not open to Webb to repudiate the mortgage as against the plaintiff, a transferee in good faith.

Renders
contract
only
voidable

IV. STANDARD FORM CONTRACTS

One of the most important developments in the sphere of contract during the last hundred years has been the appearance of the standard form contract,³ or 'contract of adhesion',⁴ as it is sometimes called. The idea of an agreement freely negotiated between the parties has given way to the necessity for a uniform set of printed conditions which can be used time and time again, and for a large number of persons. Each time an individual travels upon a bus or train, takes his clothes to the dry-cleaner, receives gas, electricity, or water from the municipal

Contracts
of adhesion

¹ At p. 808.

² *Supra*, p. 141.

³ See Sales (1953), 16 Mod. L.R. 318; Melville (1956), 19 Mod. L.R. 26; Turpin (1956), 73 S.A.L.J. 144; Gardner, 'Freedom of Contract', in *The Law in Action*, ii. 39; Friedmann, *Law and Social Change in Contemporary Britain*, p. 45.

⁴ Saleilles, *De la Déclaration de la Volonté* (1901).

supply, deposits his luggage in a railway cloakroom, or even, in some cases, takes a lease of a house or flat, he will receive a standard form contract, devised by the supplier, which he must either accept *in toto* or, theoretically, go without. In fact, he has no alternative but to accept; he does not negotiate, but merely adheres. In some respects, therefore, it would be more correct to regard the relationship which arises not as one of contract at all, but as one of status. The contractee enjoys, if that is the word, the status of a consumer.

Nevertheless the Courts have been forced to apply to this situation the ordinary principles of the law of contract which are not entirely capable of providing a just solution for a transaction in which freedom of contract notoriously exists on one side only. In particular, the party delivering the document is permitted to exempt himself unfairly from certain of his liabilities at common law, and thus to deprive the consumer of the compensation which he might reasonably expect to receive for any loss or injury or damage arising out of the transaction. Again, standard form contracts are normally contained in some printed ticket, or notice, or receipt, which is brought to the attention of the party contracting at the time he enters into the agreement and which, if he were prudent, he would read from beginning to end. In fact, however, he has normally neither the time nor the energy to do this, and, even if he were to do so, it would assist him hardly at all for he could not discuss or vary the terms in any way. It is not until some dispute arises that he realises how few his rights are.

Acting within the limitations imposed upon them by the contractual framework of these transactions, the Courts have endeavoured to alleviate the position of the consumer by requiring certain standards of notice in respect of the onerous terms, and by construing the document wherever possible in his favour. In this section we shall consider the rules which they have applied, but it should be noted that, except where the legislature has intervened, the measure of protection which these rules offer is necessarily very slender, and most of them can be successfully circumnavigated by an experienced draftsman.

Notice of Printed Terms

As we have already seen, a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, and even though he is ignorant of their precise legal effect. But if the document is not

Notice of
terms of
contract

signed, being merely delivered to the contractee, then the question arises whether the terms of the contract were adequately brought to his notice.

(a) *The notice must be contemporaneous with the contract*

Notice
must be
contem-
poraneous

In order that a term should become binding as part of the contract it must be brought to the notice of the contracting party before or at the time that the contract is made. If it is not communicated to him until afterwards, it will be of no effect unless there is evidence that the parties have entered into a new contract on a different basis.

A good illustration of the necessity for contemporaneity is provided by *Olley v. Marlborough Court, Ltd.*:¹

The plaintiff and her husband were accepted as guests for reward at the defendants' hotel. They paid for a week's board and lodging in advance, and then went up to their room where a notice was exhibited which contained the clause: 'The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the manageress for safe custody.' Owing to the negligence of the hotel staff, a thief gained access to the room and stole some of their property.

The Court of Appeal held that the notice formed no part of the contract since the plaintiff could not have seen it until after the contract was made; the defendants were accordingly liable for the loss. It will be seen from this case that one party cannot unilaterally, after the conclusion of the contract, impose upon the other onerous terms without his knowledge and assent. Such knowledge may, however, be presumed if the subsequent notice is reasonably sufficient in the circumstances,² and assent to its terms may be presumed from subsequent words or conduct. Thus in the case of a contract to deliver goods by instalments, if the invoices or delivery notes contain printed terms which were not part of the original contract and adequate notice of these terms is given to the contractee, his subsequent acceptance of the goods subject to the terms may indicate that he assents to their being imposed upon him. The parties will be taken to have entered into a new contract which includes the printed terms.³

(b) *The meaning of notice*

Communi-
cation of
notice

We have now to consider in what circumstances a party receiving a ticket, receipt, or common form document at the

¹ [1949] 1 K.B. 532.

² *Infra*, p. 149.

³ *Smith v. Carson*, [1916] E.L.D. 26 (South Africa).

time he enters into a contract, will be bound by the conditions contained in it. In order that a contract should come into existence, according to the normal rules of offer and acceptance, the terms of the contract should be communicated to the offeree, that is to say, he should be made subjectively aware of their nature and extent. But the exigencies of modern conditions have introduced a more objective idea of *consensus* where such standard form contracts are concerned, and notice must here be reconsidered from this standpoint.

Let us again take the example of a railway or cloakroom ticket. Three general rules have been laid down by the Courts to determine whether the traveller or depositor will be bound by the terms contained in the ticket:¹

1. If the person receiving the ticket did not see or know that there was any writing on the ticket, then he is not bound by the conditions.
2. If he knew that there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions, even though he did not read them and did not know what they were.
3. If he knew that there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the party delivering the ticket has done all that can reasonably be considered necessary to give notice of the term to persons of the class to which he belongs.

It will quickly be seen that it is the third of these rules which is at once the most frequently to be applied and the most difficult in its application. It is sometimes known as the test of 'reasonable sufficiency of notice'.

(c) *Reasonable sufficiency of notice*

It is now well established that a standard form contract may be imposed on another who is subjectively ignorant of its contents if the party imposing the contract has given notice which is reasonably sufficient in the circumstances.

The leading case is *Parker v. South Eastern Railway Co.*:²

Examples
of adequate
notice

The plaintiff deposited a bag in the cloakroom of a railway station belonging to the defendants. He received a paper ticket which said on its

¹ *Parker v. South Eastern Railway Co.* (1877), 2 C.P.D. 416, at pp. 421, 423; approved in *Richardson, Spence & Co. v. Rowntree*, [1894] A.C. 217.

² (1877), 2 C.P.D. 416; *Hood v. Anchor Line (Henderson Bros.), Ltd.*, [1918] A.C. 837.

face 'See back' and on the back were a number of printed conditions, including a clause limiting liability for any package to £10. The bag was lost, and the plaintiff claimed £24 10s., its value.

It was held that, even though he had not read the exemption clause, he was bound by it, as the defendants had done what was reasonably sufficient to give him notice of its existence. The test is highly objective, and the fact that the particular plaintiff is under some non-legal disability, for example, that he cannot speak English, or is blind, or illiterate, is quite immaterial, provided that the notice is reasonably sufficient for the class of persons to which he belongs. So in *Thompson v. L. M. & S. Railway Co.*:¹

The plaintiff was illiterate and could not read. Her niece bought for her a railway excursion ticket on the face of which were the words 'For conditions see back'. The back of the ticket referred the reader to the company's time-tables and excursion bills. The excursion bills referred to the company's time-tables (price 6d.) which contained a clause exempting the company from liability in respect of injury, fatal or otherwise, however caused. The plaintiff was injured by the negligence of the company.

The Court of Appeal held that her illiteracy had no effect; the notice given, though circuitous, was reasonably sufficient for ordinary travellers, the class to which the plaintiff belonged.

and of
inadequate
notice In *Richardson, Spence & Co. v. Rowntree*, on the other hand, the notice given was considered inadequate:²

The plaintiff, Minnie Rowntree, contracted with the defendants to be carried as a passenger on their steamer from Philadelphia to Liverpool. She paid her passage money and received a ticket which contained a number of printed terms including one limiting the liability of the defendants to \$100. The ticket was handed to her folded up, and the conditions were obliterated in part by a stamp in red ink. She sustained injuries during the voyage, and sued the defendants.

The jury found that, although she knew there was writing on the ticket, she did not know the writing contained conditions. Accordingly the question was whether reasonably sufficient notice had been given, and the verdict of the jury was that it had not. The House of Lords refused to upset this finding.

Fact or law The question whether all that is reasonably necessary to give notice has been done is a question of fact,³ 'in answering which

¹ [1930] 1 K.B. 41.

² [1894] A.C. 217; *Union Steamships v. Barnes* (1956), 5 D.L.R. (2nd) 535 (Canada).

³ *Parker v. South Eastern Railway Co.* (1877), 2 C.P.D. 416; *Richardson, Spence & Co. v. Rowntree*, [1894] A.C. 217.

the tribunal must look at all the circumstances and the situation of the parties';¹ but in this, as in all questions of fact, it is for the Court to decide, as a matter of law, whether there is evidence to go before a jury. The Courts have not hesitated to use their power of withdrawing a case from the jury,² and have tended to confine the issue of fact within the narrowest limits; also, now that few civil cases of this nature are heard with a jury, it is difficult to escape the conclusion that the question of reasonable sufficiency of notice has, in fact, become one of law, even if, in law, it ought to be one of fact. It is the practice, for example, always to refer on the face of the ticket to the fact that there are conditions printed on the back. If this is not done, then following the case of *Henderson v. Stevenson* in 1875,³ the Courts have consistently held that such a notification is defective. Strictly, of course, the issue is one of fact in each particular case, but this requirement may now fairly be said to be one of law.

It often happens that one party to the contract will put up a printed notice, or notices, containing conditions, for example the notice exhibited at the counter of a left-luggage office at a railway station. The question must then arise whether such a notice becomes part of the contract. In *Watkins v. Rymill*:⁴

Exhibited
notices

The plaintiff deposited his wagonette at the defendant's repository. He received from the defendant a printed receipt which contained the words 'subject to the conditions as exhibited on the premises'. These were printed in notices displayed in prominent places on the premises, and gave the depositee (the defendant) a right to sell the goods deposited within a month unless all expenses were paid. The defendant exercised this power, and was sued by the plaintiff.

It was held that the notice given to the plaintiff was reasonably sufficient in the circumstances. In this case, however, the receipt referred to the notices; but suppose there were no reference at all? It seems that it would be necessary for the conditions to be 'brought home' to the contractee.⁵ It is not sufficient simply to put up a printed notice containing exempting clauses; the party relying on the notice must go further and

¹ *Hood v. Anchor Line (Henderson Bros.), Ltd.*, [1918] A.C. 837, per Lord Haldane at p. 844.

² *Thompson v. L. M. & S. Railway Co.*, [1930] 1 K.B. 41.

³ (1875), L.R. 2 H.L. Sc. App. 470; *Sugar v. L. M. & S. Railway Co.*, [1941] 1 All E.R. 172.

⁴ (1883), 10 Q.B.D. 178.

⁵ *Olley v. Marlborough Court, Ltd.*, [1949] 1 K.B. 532.

show affirmatively that it was a contractual document and accepted as such by the party affected.¹

(d) *Non-contractual documents*

Vouchers
and
receipts

If the document is one which the receiver would scarcely expect to contain conditions, for example, if it consisted of the sort of ticket which a reasonable man would suppose to be merely a voucher or receipt, it cannot be said that the notice given was reasonably sufficient in the circumstances. Such a document was envisaged by Mellish L.J. in *Parker v. South Eastern Railway Co.*, when he said:²

I think there may be cases in which a paper containing writing delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread.

In *Chapelon v. Barry U.D.C.*³ the Court of Appeal relied upon this statement to reach their conclusion:

The plaintiff wished to hire a deck chair from the defendants in order to sit on the beach. He took one from a pile, paying 2d. for it and receiving a ticket from an attendant. He carried the chair away to a flat part of the beach, set it up firmly, sat on it—and went through the canvas. In an action by the plaintiff against them for personal injuries sustained, the defendants pleaded an exemption clause printed on the back of the ticket: 'The council will not be liable for any accident or damage arising from hire of chairs.' The plaintiff had glanced at the ticket but had not realised that it contained conditions.

The Court held that this was the type of document referred to by Mellish L.J. and that the defendants were not protected. Another case, from Scotland, is that of *Taylor v. Glasgow Corporation*:⁴

The pursuer was accustomed to take a hot bath weekly at a public bath house run by the defenders. She paid 6d. each time, and received a ticket which had to be shown to an attendant in order to obtain a bath. The ticket contained conditions limiting liability for injury or damage. The pursuer suffered injuries because of the negligence of the bathroom

¹ *Harling v. Eddy*, [1951] 2 K.B. 739, per Denning L.J. at p. 748; *Rowley v. Horne* (1825), 3 Bing. 2.

² (1877), 2 C.P.D. 416, at p. 422.

³ [1940] 1 K.B. 532.

⁴ [1952] S.C. 440.

staff. On that occasion, she had been compelled to wait one half-hour for a bath, and during this time she had held the ticket in her hand but never glanced at it.

The Court of Session nevertheless held that she was entitled to recover. The ticket might reasonably be supposed to be merely a receipt or pass, and not a contractual document.

Construction of Exemption Clauses

Assuming that reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Such is the disparity between the bargaining power of industrial monopolistic concerns and the individual contractee that terms are often imposed upon him which are onerous or unfair in their application and which exempt the deliverer of the document, either wholly or in part, from his just liability under the contract. In construing such exemption clauses, the Courts have been conscious of the social considerations involved and have made use of certain canons of construction which normally but not invariably, work in favour of the individual or party to whom the document is delivered.

Exemption clauses construed

(a) *The 'contra proferentem' rule*

These words come from the Latin maxim: *verba chartarum fortius accipiuntur contra proferentem*—the words of written documents are construed more strongly against the party using them. This rule of construction has already been referred to,¹ and it must again be emphasized that it is only to be applied in cases of ambiguity and where other rules of construction fail.

Ambiguities resolved against drawer of instrument

Its usefulness in relation to exemption clauses lies in the fact it is the party seeking to impose the exemption who frames the written instrument; if there is any doubt or ambiguity in the phrases used, it must be resolved against him and in favour of the contractee. In *Lee (John) and Son (Grantham), Ltd. v. Railway Executive*:²

The plaintiffs leased from the defendants a railway warehouse. The lease contained a clause exempting the defendants from liability for 'loss or damage (whether by act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created . . . would

¹ *Supra*, p. 140.

² [1949] 2 All E.R. 581; *Houghton v. Trafalgar Insurance Co., Ltd.*, [1954] 1 Q.B. 247.

not have arisen'. Goods in the warehouse were damaged by fire owing to the alleged negligence of the defendants in allowing a spark or other combustible substance to escape from their railway engines. The defendants claimed that the clause exempted them from liability.

The Court of Appeal held that, applying the *contra proferentem* rule, the operation of the clause was confined by the words 'but for the tenancy hereby created' to liabilities which arose only by reason of the relationship of landlord and tenant created by the lease. The clause was capable of a wider meaning, but it had to be construed against the grantor, and the defendants were not protected.

(b) *Exclusion of tortious liability for negligence*

Liability for negligence There is a general rule that, where the defendant has protection under a contract, it is not permissible to disregard the contract and to allege a wider liability in tort.¹ But of course it is still necessary to inquire whether he has effectively excluded his tortious liability by means of the contractual terms. In order to discover whether this is the case, the Courts have recourse to certain rules of construction and interpretation.

may be excluded If the clause expressly exempts the person relying on it from the torts (usually negligence) of himself and his servants or agents, then effect must be given to that provision. In *Rutter v. Palmer*,² for example:

The plaintiff left his car at the defendant's garage for sale on commission. The terms of the contract were that 'customers' cars are driven by your (the defendant's) servants at customers' sole risk'. The car was sent out by the defendant in charge of one of his drivers for a trial run, there was a collision and the car was damaged.

It was held that the clause was wide enough to protect the defendant from liability for the negligence of his servants, and so the plaintiff's claim failed.

Alderslade v. Hendon Laundry, Ltd. If, on the other hand, there is no express reference, but the term is still general enough to exclude liability for negligence, the Court must consider the application of the rule in *Alderslade v. Hendon Laundry, Ltd.*³ This rule falls into two parts:

(i) 'Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be

¹ *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205, *per* Scrutton L.J. at p. 213.

² [1922] 2 K.B. 87.

³ [1945] K.B. 189.

construed as extending to that head of damage, because if it were not so construed, it would lack subject matter.'

To illustrate this first part, let us take the case of *Alderslade v. Hendon Laundry, Ltd.* itself:

The plaintiff sent certain of his handkerchiefs to the defendants' laundry. They were not returned to him. When sued the laundry relied on a clause which stated: 'The maximum amount allowed for a lost or damaged article is twenty times the charge made for laundering.'

The Court of Appeal accepted the argument of counsel for the defendants that the words 'loss or damage' must relate to loss or damage by negligence and nothing else. They could not relate to the primary obligation to launder the plaintiff's linen, as this was a fundamental term of the contract into which a question of due care did not enter. They could only relate to the other ancillary obligations, for example to redeliver the goods, and to ensure their safe custody, for which the laundry was not an insurer, but only undertook not to be negligent. So, where loss was concerned, the only possible ground of liability was in negligence, and the exemption clause must extend to this, otherwise it would be otiose and lack substance.

(ii) 'Where on the other hand, the head of damage may be based on some ground other than negligence, the general rule is that the clause must be confined to loss occurring through that other cause to the exclusion of negligence.'

An example of the application of this part of the rule is provided by *White v. John Warwick & Co., Ltd.*:¹

The plaintiff hired a bicycle from the defendants. The contract contained a term that 'nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired'. The plaintiff had only ridden for a quarter of a mile when the saddle tipped up and he was thrown onto the road, sustaining injuries. He sued the defendants alternatively for breach of contract and in tort for negligence.

It was clear that, in this case, there was a head of damage other than negligence, namely, a strict liability for breach of contract. The Court of Appeal therefore held that the exemption clause was confined to this head alone, and did not exclude a claim for damages in tort. The defendants were accordingly liable.

To illustrate still further the operation of both parts of the rule, let us take the case of a carrier of goods who inserts in the

Illustration

¹ [1953] 1 W.L.R. 1285; *Canada Steamship Lines, Ltd. v. The King*, [1952] A.C. 192.

contract of carriage a clause excluding liability for loss by fire.¹ If he is merely a private carrier, this clause will effectively exclude liability in tort for fire negligently caused. The reason for this is that a private carrier is only liable for fire if it occurs by his negligence. The exemption clause must therefore refer to this, as there is no other head of liability upon which the owner of the goods could base his claim. But if he is a common carrier, then he will not be protected. A common carrier is strictly liable for loss by fire, whether the fire is caused by his negligence or not. There is consequently an alternative ground of liability, and the operation of the clause will be confined to this to the exclusion of negligence.

It should be emphasized, however, that the rule in *Alderslade v. Hendon Laundry, Ltd.* is not to be applied where the words used clearly exclude all liability whatsoever. So such phrases as: 'will not be liable for any injury however caused',² 'will not in any circumstances be responsible',³ 'entirely at the owner's risk',⁴ will preclude the operation of the rule.

(c) *Fundamental breach*

Funda-
mental
obligations

The doctrine of 'fundamental breach' has already been referred to, and it is proposed to deal with it in greater detail later in this chapter.⁵ For the moment, however, we should note that even though a defendant has excluded liability by means of an exemption clause for the negligence of himself and his servants, he cannot exclude his fundamental obligation to perform the contract into which he has entered.

So in *Bontex Knitting Works, Ltd. v. St. John's Garage*:⁶

The plaintiffs hired from the defendants a van and driver for two and a half hours for the purpose of delivering goods to their customers expeditiously. During the journeys, the van driver left the van unattended for an hour in order to have a meal, and the goods were stolen while he was away. An exemption clause in the contract of hire stated: 'the defendants do not hold themselves responsible for loss or damage to goods in the van.' The plaintiffs sued for the value of the goods, alternatively in tort for negligence, and for breach of contract.

The Court held that, even though the defendants had effectively excluded their liability in tort, they could not exclude their

¹ *Fagan v. Green and Edwards, Ltd.*, [1926] 1 K.B. 102.

² *Ashby v. Tolhurst*, [1937] 2 K.B. 242.

³ *Gibaud v. G. E. Railway Co.* [1921] 2 K.B. 426, at p. 427.

⁴ *Rutter v. Palmer*, [1922] 2 K.B. 87; *supra*, p. 154.

⁵ *Infra*, p. 162.

⁶ [1943] 2 All E.R. 690; [1944] 1 All E.R. 381.

fundamental duty under the contract to deliver the goods forthwith to their destination. They had failed to perform the contract into which they had entered, and were bound to pay damages for this fundamental breach.

(d) *The 'four corners' rule*

A rule which is similar to, but distinct from, the doctrine of fundamental breach is the 'four corners' rule. A party can only rely on an exemption clause inserted in his favour if the loss or damage comes within the 'four corners' of the contract. Even though he successfully excludes liability in tort and contract, he will not be protected if the damage takes place outside the ambit of the contract altogether.

It is, of course, for the Court to decide what is the proper scope of the contract, and whether the damage occurs inside or outside of it. In *Davies v. Collins*¹ it fell outside:

A United States army officer took his uniform to the defendant's shop to be cleaned. On the contractual receipt given to him, the defendants, while undertaking to use 'every care' in cleaning, repudiated all liability for damage arising in the course of 'necessary handling'. Their responsibility for loss was further limited to ten times the cost of cleaning. The uniform was never returned. It was shown that the defendants had sub-contracted the task of cleaning and that this was how the loss occurred.

The Court of Appeal held that the words 'every care' and 'necessary handling' indicated that the contract was one which was to be personally performed by the defendants. The farming out to a sub-contractor was outside the scope of the contract altogether, and they could not rely on the exempting clause.

A similar, and ingenious, application of this principle was seen in *Woolmer v. Delmer Price, Ltd.*:²

The plaintiff deposited with the defendants a mink coat for storage. The defendants' usual receipt contained the words: 'All goods left at customers' risk'. The coat was lost.

McNair J. construed the exemption clause as covering loss by negligence. So the defendants, in order to take advantage of it, had to prove that the loss occurred by their negligence, or, in order to repudiate liability in any case, that it occurred without their negligence. But they were unable to show how the loss occurred. It might, for example, have been occasioned by a wrongful sale, or by delivery for storage to a sub-contractor,

¹ [1945] 1 All E.R. 247.

² [1955] 1 Q.B. 291.

acts which would fall outside the 'four corners' of the contract altogether. Consequently, the defendants were liable.

(e) *The 'main purpose' rule*

Inconsistency with main purpose The 'main purpose' rule is a rule of construction. If an exemption clause is inconsistent with the main purpose of the contract as a whole, the Court will limit or even disregard the clause when construing the contract. In *Glynn v. Margetson & Co.*:¹

Oranges were shipped on board the steamship *Zena* described in the bill of lading as 'now lying in the port of Malaga (Spain) and bound for Liverpool'. The bill of lading also gave liberty in its printed clauses to the shipowners to proceed and stay in any port in the Mediterranean, Levant, Black Sea, Adriatic and Atlantic Coast. The ship left Malaga, went right up the East coast of Spain towards Valencia, and, doubling back again, made its way to Liverpool. The oranges arrived in a damaged condition, and the consignees sued the shipowners.

The House of Lords held that the liberty clause was inconsistent with the main purpose of the particular contract which was a voyage from Malaga to Liverpool with a perishable cargo. It ought therefore to be disregarded, and the shipowners were liable. Lord Halsbury L.C. said:²

Looking at the whole of the instrument, and seeing what one must regard as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

This power must, however, be sparingly exercised, as the Court is bound to give effect to every clause of the contract if possible, and not to exclude any term unless it is manifestly inconsistent with the rest of the agreement.³

Other Limitations

The operation of exemption clauses may be further limited by the application of certain other rules of law of a heterogeneous nature.

(a) *Overriding oral warranties*

Oral warranties We have already seen that a collateral oral representation may be incorporated into a written contract if it is proved that

¹ [1893] A.C. 351; *Neuchatel Asphalt Co., Ltd. v. Barnett*, [1957] 1 W.L.R. 356. Cf. *Renton (G. H.) & Co. Ltd. v. Palmyra Trading Corporation of Panama*, [1957] A.C. 149.

² At p. 357.

³ Viz. *supra*, p. 139.

the party making the representation intended it to be a warranty, that is to say, a term of the contract itself.¹ But a standard form contract containing printed terms may also be varied by such a warranty, and, in certain circumstances, the oral representation will override the written agreement.

In the case of an exemption clause, for example, the party who might otherwise take advantage of the exemption may give an oral warranty which is inconsistent with the terms of the exemption clause, and thus deprive himself of its protection. In *Couchman v. Hill*:²

The plaintiff bought at an auction sale a heifer, the property of the defendant, described in the catalogue of sale as 'unserved'. In the same document was printed a clause: 'all lots must be taken subject to all faults or errors of description (if any), and no compensation will be paid for the same'. Also the conditions of sale exhibited at the auction contained a similar exemption clause in favour of the auctioneers. The plaintiff asked the defendant to confirm that the heifer was unserved, and received an affirmative answer. After the sale, the heifer was found to be in calf, and died as a result of carrying a calf too young.

It was held that the defendant had modified the printed terms of the sale by his oral assurance, and that he was liable for breach of the warranty given.

(b) *Third parties*

It is a fundamental principle of English law that one who is not a party to a contract cannot sue on it. Thus if *A* makes a contract with *B* whereby he promises to pay £100 to *C*, a third party, *C* has no right to sue if he is not paid the money. The reason for this is twofold. In the first place, *C* has normally furnished no consideration for the promise,³ and secondly the doctrine of 'privity of contract' supervenes.⁴

Benefit to
third
parties

This limitation is relevant to the operation of standard form contracts because a party imposing the document may attempt to confer exemption not only upon himself but also on persons who are not parties to the contract, for example, his servants or sub-contractors. Such attempts will not always be successful. In *Cosgrove v. Horsfall*:⁵

The plaintiff was employed by the London Passenger Transport Board. He was given a free pass by the Board to travel on their omnibuses

¹ *Supra*, p. 133.

² [1947] K.B. 554; *Harling v. Eddy*, [1951] 2 K.B. 739.

³ *Viz. supra*, p. 86.

⁴ *Viz. infra*, p. 347.

⁵ [1945] 62 T.L.R. 140.

free of charge, but the pass contained a condition that 'neither the Board nor their servants were to be liable to the holder for any injury however caused'. The plaintiff suffered personal injuries as the result of the negligence of the defendant, a bus driver and a servant of the Board. Having no remedy against the Board, he sued the defendant personally.

The Court of Appeal held that the defendant was liable. He could not claim the benefit of the exemption clause as he was not a party to the agreement.

Agency This is not always so, however, for the makers of the document may contract as agents, either expressly or by implication, on behalf of the third party, or there may even be a distinct contract, implied from conduct, between the third party and the contractee. Cases of this nature frequently arose during the course of the nineteenth century, when this country was covered by a network of small railway companies and a contract made with one might entitle the holder of a ticket to travel on one or more of the others. In such circumstances, the traveller could not be heard to say that only the company which was a party to the primary agreement was protected by the exemption clauses contained in it. The Courts were ready to imply either that the contracting company was acting as agent for the other companies,¹ or that it was acting as agent for the plaintiff.² A more modern, and more important, illustration of the same principle is provided by *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*:³

A firm of charterers agreed with the plaintiffs to carry a cargo of palm oil in casks from West Africa to England. They chartered from another company (the shipowners) a ship *Grelwen* for this purpose. The ship loaded the oil casks at a West African port, but the casks were placed under bags of kernels which, being heavy, crushed them so that the oil was lost. The bills of lading, made between the plaintiffs and the charterers, purported to protect both the charterers and the shipowners from claims arising out of bad stowage. The plaintiffs sued both the charterers and the shipowners for the loss.

The House of Lords held that both defendants were protected. The reasons for the decision are not too clear, but it seems that the charterers were to be regarded as agents for the shipowners for the purpose of the exemption clause. In his judgment, however, Viscount Cave went so far as to suggest that an agent

¹ *Hall v. N.E. Railway Co.* (1875), L.R. 10 Q.B. 437, at p. 442.

² *Ibid.*, at p. 443.

³ [1924] A.C. 522. Cf. *Wilson v. Darling Island Stevedoring Co., Ltd.* (1955), 95 C.L.R. 43.

is *always* entitled, while performing the contract, to any immunity conferred on his principal, and that since the ship-owners here took possession of the goods on behalf of and as agents for the charterers, they could claim the benefit of the exemption clause.¹

The problem was fully considered in the case of *Adler v. Dickson*:²

The plaintiff was a passenger on the P. & O. steamship *Himalaya*. At Trieste she went ashore and, on returning to the ship, she was injured when the gangway slipped as she went on board. On her first-class ticket was printed a clause: 'the company will not be responsible for any injury whatsoever . . . whether the same shall have been occasioned by the negligence of the company's servants on board the ship or on land in discharge of their duties'. Being thus unable to sue the company, she sued the master and boatswain of the *Himalaya*.

Pilcher J., at first instance, distinguished the *Elder, Dempster Case* on the ground that it was a case concerning the carriage of goods by sea to which special considerations applied. There was no possibility here of an implied contract between the plaintiff and the company's servants and, even less than *Cosgrove v. Horsfall* could any agency be spelt out of the transaction, as the ticket did not purport to confer any immunity on them. His decision was upheld by the Court of Appeal, and it must be presumed that the reasoning of Viscount Cave in the *Elder, Dempster Case* must be taken to be no longer good law. An exemption clause inserted by a contracting party does not automatically confer the same exemption upon his servants or agents when performing the contract, and will not do so unless he can be understood either expressly or impliedly to have contracted on their behalf.

A similar problem arises in relation to the burden of an exemption clause. It is a trite principle of law that a person cannot be subjected to the burden of a contract to which he is not a party. So, an exemption clause in a standard form contract ought only to operate so as to take away the rights of the contracting parties, and not those of third parties who suffer injury or damage. In *Haseldine v. C. A. Daw and Son, Ltd*:³

Burden on
third
parties

The owners of a block of flats employed the defendants, a firm of engineers, to maintain and repair a lift in the building. Owing to their

¹ At p. 534.

² [1955] 1 Q.B. 158.

³ [1941] 2 K.B. 343; now regulated by the Occupiers' Liability Act, 1957 (5 & 6 Eliz. II, c. 31), s. 3 (1).

negligence, the lift was badly repaired and the plaintiff, a visitor to the premises, was injured when the lift fell to the bottom of the lift-shaft.

The defendants were held liable in tort for negligence. Goddard L.J. said:¹

It is, however, argued that it is not right that a repairer who, as in the present case, has stipulated with the person who employs him that he shall not be liable for accidents, should none the less be liable to a third person. The answer to this argument is that the duty to the third party does not arise out of the contract but independently of it.

This reasoning would seem to be unanswerable, and it is therefore rather surprising that the same learned judge should in an earlier case have reached the opposite conclusion. In *Fosbrooke-Hobbes v. Airwork, Ltd.*,² he considered that a guest of a person who had hired an aircraft would be bound by an exemption clause contained in the contract of hire even though he was not a party to the agreement. In his judgment he said:³

The obligations of the owner cannot be increased by the fact that the person with whom he has made his contract chooses to bring along persons who are in no contractual relation with the owner.

It is submitted that the decision in the former case is to be preferred as being more consistent with authority. The result will then be that, in the absence of special factors such as agency,⁴ the burden of an exemption clause will not operate to prejudice the rights of a person who was not a party to the contract.

(c) *Fundamental breach*

Funda-
mental
provisions

We have already mentioned the doctrine of the 'fundamental term' or 'fundamental breach' both in relation to the exclusion of the conditions and warranties implied by the Sale of Goods Act, 1893,⁵ and also in connexion with the exclusion of liability for negligence.⁶ It is not possible by means of an exemption clause for one party to the contract to exempt himself from the necessity to perform the fundamental provisions of the agreement and, if he purports to do so, such a clause will be nugatory.

It is, for example, a fundamental term of a contract of

¹ At p. 379. See also *White v. John Warwick & Co., Ltd.*, [1953] 1 W.L.R. 1285, and *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.*, [1954] 2 Q.B. 402.

² [1937] 1 All E.R. 108.

³ At p. 112.

⁴ *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.*, [1954] 2 Q.B. 402; *infra*, p. 355.

⁵ *Supra*, p. 126.

⁶ *Supra*, p. 156.

charter-party that the ship chartered shall be seaworthy,¹ and of a contract of bailment that the bailee will not allow unauthorized persons wrongfully to remove part of the goods bailed.² In *Karsales (Harrow), Ltd. v. Wallis*:³

The defendant was shown a second-hand Buick motor-car in excellent condition, and wished to buy it. Arrangements were made with a finance company for hire-purchase, and the agreement contained an exemption clause excluding liability for breach of conditions or warranties of any description. After the contract had been concluded, the car was towed at night to the defendant's premises. It was in a deplorable state. Many detachable parts had been removed; new parts replaced by old; the engine was now so defective that the car would not go. The defendant refused to accept it, and was sued by the plaintiffs, assignees of the finance company.

The Court of Appeal held that there was here a fundamental breach of the contract, and the exemption clause was ineffective.

(d) Reasonableness

The older theory of freedom of contract presupposed that any party to a contract was free to choose whether or not he would enter into it.⁴ If, therefore, he chose to enter into a contract which was onerous to him he had only himself to blame. The Courts would not interfere. But the emergence of standard form contracts has quickly dispelled this idea of contractual freedom, and it is now seen that the bargaining powers of the parties may be so unequal that one can virtually dictate terms to the other. Even in 1877 in *Parker v. South Eastern Railway Co.*⁵ Bramwell L.J. asked what the position would be if some unreasonable condition were inserted, as for instance, to forfeit £1,000 if goods in a station cloakroom were not removed within forty-eight hours. He thought that 'there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand'. Also in *John Lee and Son (Grantham), Ltd. v. Railway Executive*,⁶ Denning L.J. expressed the opinion that an unreasonably onerous term in a standard form contract

Reason-
ableness in
standard
form con-
tracts

¹ *Atlantic Shipping and Trading Co., Ltd. v. Louis Dreyfus and Co.*, [1922]

² A.C. 250.

³ *Alexander v. Railway Executive*, [1951] 2 K.B. 882.

⁴ [1956] 1 W.L.R. 936. Cf. *Spurling (J.), Ltd. v. Bradshaw*, [1956] 1 W.L.R. 461.

⁵ Viz. *supra*, p. 5.

⁶ (1877), 2 C.P.D. 416, 428.

⁷ [1949] 2 All E.R. 581.

would not be enforced by the Courts, for 'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused'.¹

But this doctrine of 'abuse of contract' has not yet been directly applied in any case and, indeed, has not found much favour among lawyers in general.² There is still a reluctance to walk upon the shifting sands of public policy and to absolve the parties from an agreement into which they have formally entered on the grounds merely that it is unreasonable. It may be that the law will expand to meet changing economic conditions, but it cannot yet be said with certainty that this pov exists.

(e) *Statute*

Statutory
provisions

The main direct intervention in the sphere of standard form contracts has been by the legislature, but this has only occurred where the abuses were a considerable social menace, as in the case of hire purchase,³ moneylenders,⁴ and pawnbrokers;⁵ where individual members of Parliament have taken the initiative, for example, in the case of the Railway and Canal Traffic Act, 1854;⁶ or where the intervention was incidental to other reforms.⁷ It has, however, been suggested⁸ that the various trades and industries concerned should draw up standard forms of contract after consultation with interested bodies, and if these were fair and satisfactory, they might be imposed upon that trade or industry by means of statutory instruments. It would seem that this would be the best way of insuring minimum standards of fairness in such contracts, and obviate the need for the application of the complicated rules of construction and limitation already mentioned.

¹ At p. 584.

² *Grand Trunk Railway of Canada v. Robinson*, [1915] A.C. 740, at p. 747; *Ludditt v. Ginger Coote Airways, Ltd.*, [1947] A.C. 233, at p. 242. Cf. *Gibaud v. G.E. Railway Co.*, [1920] 3 K.B. 689, where it was said that terms must not be so unreasonable as to amount to fraud, or manifestly irrelevant to the object of the contract (affirmed [1921] 2 K.B. 426).

³ Hire Purchase Acts, 1938 (1 & 2 Geo. VI, c. 53) and 1954 (2 & 3 Eliz. II, c. 51).

⁴ Moneylenders Act, 1927 (17 & 18 Geo. V, c. 21).

⁵ Pawnbrokers Acts, 1872 (35 & 36 Vict., c. 93) and 1922 (12 & 13 Geo. V, c. 5).

⁶ 17 & 18 Vict., c. 31, s. 7.

⁷ e.g. in the Industrial Assurance Act, 1923 (13 & 14 Geo. V, c. 8).

⁸ Sales (1953), 16 M.L.R. 318. See also the Fifth Report of the Law Reform Committee (Conditions and Exceptions in Insurance Policies), Cmd. 62.

PART II
FACTORS TENDING TO DEFEAT
CONTRACTUAL LIABILITY

CHAPTER V. INCAPACITY

CHAPTER VI. MISREPRESENTATION

CHAPTER VII. DURESS AND UNDUE INFLUENCE

CHAPTER VIII. MISTAKE

CHAPTER IX. ILLEGALITY

CHAPTER V

INCAPACITY

IN the topics which we have so far discussed, we have assumed that the transaction takes place between parties neither of whom is under any disability from making a valid contract. It is now necessary to deal with disabilities, in other words, with the topic of Incapacity. Causes of contractual incapacity

Certain persons are, by law, incapable, wholly or in part, of binding themselves by a promise, or of enforcing a promise made to them. And this incapacity may arise from the following causes:

1. Political status.
2. Infancy.
3. Corporate personality.
4. Lunacy or drunkenness.

Since the passing of the Married Women (Restraint upon Anticipation) Act, 1949,¹ the previous restraints imposed upon married women by the common law have now been completely removed, and marriage no longer affects the contractual capacity of a woman in any way.

It should not be supposed, however, that the consequences of incapacity are always identical. In some cases the contract is void, in others voidable, while in others it is unenforceable at the suit of one or both parties. It is necessary to examine the rules applicable to each particular case.

I. POLITICAL STATUS

Aliens

An alien has ordinarily the contractual capacity of a natural-born British subject, except that he cannot acquire property in a British ship.² In time of war, however, an alien who is an enemy, so far as concerns his capacity to contract or to enforce contracts already made, is subject to severe restrictions. These restrictions may be further increased by Trading with the Enemy Acts, which make dealings of all kinds, direct or indirect, with or for the benefit of the Queen's enemies a criminal Alien enemies

¹ 12, 13, & 14 Geo. VI, c. 78.

² Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), s. 1.

offence. But it will be sufficient here to indicate the common law rules on the subject.

Test of
enemy
status

We must note in the first place that nationality is not the test of enemy status for this purpose. The full Court of Appeal in *Porter v. Freudenberg*,¹ after reviewing all the authorities, laid down that the place where the person resides or carries on business is the determining factor; so that an enemy subject who resides or carries on business exclusively in a neutral country or (with licence of the Crown) in Great Britain itself, may contract or sue on the same footing as an alien friend. Conversely, a British subject or a neutral residing or carrying on business in an enemy territory (which for this purpose includes territory occupied by the enemy) is in the same position as an alien enemy. A corporation has the character of an enemy if either it is incorporated according to the laws of an enemy state, or, if incorporated in the United Kingdom or a neutral country, it is under the control of the enemy:

If its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies.²

The Courts are willing to 'pierce the veil' of corporate personality in order to inquire into the true state of affairs within the corporation.³

The position of an alien enemy, as above defined, appears from *Porter v. Freudenberg*⁴ to be as follows:

1. He cannot, during the continuance of the war, enter into any contract with a person who is in, or carrying on business in, Great Britain.

2. He cannot, until the war is over, sue in the Queen's Courts on any cause of action which has accrued before the war.⁵

3. He may, if he can be duly served with a writ, be sued on a cause of action which has accrued before the war, and it

¹ [1915] 1 K.B. 857.

² *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307, *per* Lord Parker at p. 345.

³ *Soefracht (v/o) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] A.C. 203.

⁴ [1915] 1 K.B. 857.

⁵ Contracts with aliens made during peace are immediately abrogated by the outbreak of war in so far as they are still executory. Accrued rights, however, are not destroyed: *Arab Bank, Ltd. v. Barclays Bank, Ltd.*, [1954] A.C. 495. See generally McNair, *The Legal Effects of War* (2nd ed.), p. 93.

follows that he may appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. He has also the right of appeal against any judgment given against him.

4. If he was the plaintiff in an action commenced before the war, and judgment has been pronounced against him, he has no right of appeal until the restoration of peace.

The Crown may at its discretion grant a licence to an alien enemy to contract and sue in time of war, and in that case his position will be exactly the same as that of an alien friend. Such a licence need not be given formally; it is enough that the alien enemy is resident in this country by the tacit permission of the Crown,¹ and he does not lose his capacity to contract or to sue on his contracts even if he is interned, at any rate if his internment is a matter of general policy.² It is possible, however, that the circumstances of his internment might imply the revocation of his licence.

The effect of war upon the contracts of alien enemies which were already in existence at the outbreak of war is dealt with later in the chapter entitled 'Impossibility of Performance'.³

Sovereigns and Representatives of Foreign States

The positions of foreign sovereigns and the representatives of foreign states may be conveniently referred to here. They have full capacity to enter into contracts in England, but they cannot be compelled to submit to the jurisdiction of the English Courts. Although they can enforce their contracts, their contracts cannot be enforced against them, unless the sovereign, or the state, agrees to waive the immunity at the time when the Court is asked to exercise jurisdiction.

This rule is illustrated by the case of *Mighell v. Sulian of Johore*:⁴

The Sultan of Johore, a foreign sovereign residing in this country as a private person, made a promise of marriage to a young woman under an assumed name. She sought to sue him for breach of this promise.

The Court held that the Sultan possessed sovereign immunity and that no act done by him before the proceedings could

¹ *Wells v. Williams* (1698), 1 Salk. 46.

² *Schaffenius v. Goldberg*, [1916] 1 K.B. 284.

³ *Infra*, p. 436.

⁴ [1894] 1 Q.B. 149. See generally on this topic Cheshire, *Private International Law* (5th ed.), p. 89. The immunity extends to choses in action: *Rahimtoola v. Nizam of Hyderabad*, [1957] 3 W.L.R. 884.

constitute submission to the jurisdiction. This immunity, however, is merely an immunity from suit, so that, for example, the guarantor of a debt owed by a diplomatic representative would be liable, for he would not enjoy the same immunity as the debtor.¹

II. INFANCY

The age of majority has been fixed by English law at twenty-one years; all persons under that age are known technically as infants. The rights and liabilities of infants under contracts entered into by them during infancy rest upon common law rules which have been materially affected by the Infants' Relief Act, 1874.²

It will be convenient first to outline the common law on the subject, and then to discuss the effect of the Statute.

Common Law

General rule of common law At common law, the only class of contract to which infancy did not afford some sort of defence was a contract for 'necessaries' in the sense to be explained later. In all other cases, common law treated an infant's contracts as being voidable at his option, either before or after the attainment of his majority. But these voidable contracts were divided into two classes:

Positive voidable contracts First, there were certain contracts in which the infant acquired an interest of a permanent or continuous nature; these were valid and binding on him until he *disaffirmed* them, either during infancy or within a reasonable time after his majority. Examples of such contracts were those by which he acquired shares in a company, or an interest in land. In this chapter we shall refer to them as 'positive voidable contracts'.

Negative voidable contracts Secondly, in the case of contracts which were not thus continuous in their operation, the common law rule was that they were not binding on him unless he *ratified* them within a reasonable time after majority. So, for example, a promise by an infant to perform an isolated act, such as to pay for goods supplied to him other than necessities, or to recompense another for work and labour done at his request, required an express ratification after majority before the infant would be

¹ *Dickinson v. Del Solar*, [1930] 1 K.B. 376.

² 37 & 38 Vict., c. 62. See a comment by Treitel (1957), 73 L.Q.R. 194, a reply from Atiyah (1958), 74 L.Q.R. 97, and a short rebutter (1958), 74 L.Q.R. 104.

bound. These will be referred to as 'negative voidable contracts'.¹

But since, at common law, both these classes of contracts were only voidable at the option of the infant and not wholly void, there was no objection to the infant enforcing them, though they could not be enforced against him. Yet in one respect his position as a plaintiff differed from that of other parties of full contractual capacity. Though he might recover damages for breach, he could not obtain specific performance of the contract.² Specific performance is an equitable remedy. It is granted at the discretion of the Court; and the Court will not grant it where the element of 'mutuality' is lacking, that is to say, where it would not be prepared to enforce the contract at the suit of either party.³ Since the contract could not be enforced against the infant, equity would not allow the infant himself to obtain specific performance against the other party.

Such, in brief, was the common law on the subject. Let us now consider how it has been affected by subsequent legislation.

*The Infants' Relief Act, 1874**

The Infants' Relief Act, 1874, appears to have been designed to guard infants not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority. Infants' Relief Act

It consists of two sections, as follows:

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

¹ It is, perhaps, strictly misleading to refer to these contracts as 'voidable' for the essence of a voidable contract is that it is binding unless repudiated, whereas these contracts were not binding unless affirmed. However, the terminology is a convenient one, and it would be inadvisable to reject it merely on purist grounds.

² *Flight v. Bolland* (1828), 4 Russ. 298.

³ Viz. *infra*, ch. xvii.

* 37 & 38 Vict., c. 62.

The precise meaning of these provisions is not easy to ascertain, but their general effect may thus be summarized:

In the first place, under section 1 of the Act, three classes of infants' contracts are, for the first time, made 'absolutely void'. These are contracts for the repayment of money lent or to be lent, for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants.

Secondly, section 2 of the Act makes it no longer possible to ratify after majority those negative voidable contracts which, at common law, were not binding unless ratified; and this is so whether there is a new consideration for the ratification or not.

Thirdly, those positive voidable contracts which were binding at common law unless repudiated before or within a reasonable time after majority are not affected by the Act. They cannot be affected by section 1, for that section deals with three specific contracts only, of which these are not one; and they are not affected by section 2, because the liability under them does not arise from any 'promise' or 'ratification' made after full age.

Fourthly, the proviso in section 1 of the Act exempts from its operation contracts into which an infant could validly enter and which, at the same time were not voidable by him; whatever else this may mean, it obviously comprehends contracts for necessities, which, in any case, are expressly exempted by the Act.

It is, however, necessary to consider these points in greater detail, as the situation is not entirely free from controversy.

Contracts 'absolutely void'

Decisions
on s. 1

The Act provides that certain contracts are to be 'absolutely void', namely, contracts 'for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than necessities), and all accounts stated with infants'.¹

It has been held that an agreement for the exchange of goods is also caught by this section.² Further, by the Betting and

¹ An 'account stated' is an acknowledgement by a debtor that he owes a certain sum to his creditor. In the modern law it is merely *prima facie* evidence of the debt, and this evidence may be rebutted by proof that there is no debt owing at all: *Siqueira v. Noronha*, [1934] A.C. 332, at p. 337. This section would not, of course, apply to cases of money lent or goods supplied by the infant, or to accounts stated with others: (1957), 73 L.Q.R. 194.

² *Pearce v. Brain*, [1929] 2 K.B. 310.

Loans (Infants) Act, 1892,¹ any negotiable instrument given in respect of a void loan of money is itself void, and cannot be enforced against the infant even after he attains his majority.

The main difficulty in the interpretation of this section has arisen out of the words 'absolutely void'. There is a considerable difference between a contract which is absolutely void, and one which is merely voidable. A void contract is a nullity from the beginning. It confers no rights and imposes no obligations on any of the parties to it. If the contract is one for the sale of goods, no property in the goods will pass under the contract, and any money paid can usually be recovered for total failure of consideration. These would be the consequences which would follow if the Courts construed the words 'absolutely void' in their literal meaning.

Meaning of
'absolutely
void'

In certain circumstances, the Courts have so construed the Act, and held that the contracts set out in the first section are completely without legal effect. In *Reg. v. Wilson*,² for instance:

W., an infant, was indicted under s. 12 of the Debtor's Act, 1869, for that he feloniously within four months before the presentation of a bankruptcy petition against him quitted England, and took with him his money to the amount of £20 and upwards, which ought by law to have been divided amongst his creditors, with intent to defraud.

His conviction was quashed on the ground that the transactions which gave rise to the debts were void under the Infants' Relief Act. There were consequently no creditors to defraud. Another case is that of *Coutts and Co. v. Browne-Lecky*,³ where it was held that the guarantor of an infant's overdraft with a bank was not liable to pay the bank on the guarantee, since there was no 'debt' of the infant to be made good.

It is difficult, however, to believe that the section was intended thus to deprive the contracts to which it relates of all legal consequences. It can hardly be supposed, for example, that if a tradesman were to supply goods to an infant under a contract which the section makes absolutely void, he could recover them from an innocent purchaser from the infant. Yet this would be the case if the contract were truly void, and no

Passing of
property

¹ 55 & 56 Vict., c. 4, s. 5.

² (1879), 5 Q.B.D. 28. See also *Re Jones, ex p. Jones* (1881), 18 Ch. D. 109 (infant cannot be made bankrupt in respect of trading debts). Cf. *Re a Debtor* (No. 564 of 1949), [1950] Ch. 282 (bankruptcy in respect of purchase tax debt).

³ [1947] K.B. 104. Cf. *Wauthier v. Wilson* (1912), 28 T.L.R. 239 (indemnity). See generally Cohn (1947), 10 Mod. L.R. 40.

property in the goods passed under it. In *Stocks v. Wilson*, this problem was considered by Lush J., who said:¹

I thought at the time that there might be some foundation for this suggestion and that, as at common law an infant who when of full age avoided the contract would have divested himself of the property, so now it might be contended that the whole transaction was avoided by the Act and that the property had not passed at all. I am satisfied that that view is wrong and that the property passed by the delivery.

It may be, of course, that if the seller actually delivers the goods to the infant with intent at the time of delivery to pass the property in them to him, then the property will pass independently of any contract, as it would with a gift. But this is not usually so in the case of void contracts, and mistake as to the validity of the transaction will generally negative any intent to pass the property.² As the law stands, however, it seems that the property does pass, even though this means that an infant who buys goods on credit can both keep the goods and refuse to pay for them.

Goods paid
for and
used

It has also been held that, where an infant pays money in pursuance of a contract rendered void by the Act, he cannot recover the money so paid if he has received any benefit whatever under the contract. In *Valentini v. Canali*:³

An infant took a lease of a house and agreed to pay the landlord £102 for the furniture. He paid £68 and gave a promissory note for the balance. After some months' use of the house and furniture, he took proceedings to get the lease set aside and to recover the money which he had paid.

Lord Coleridge C.J. ordered that the lease should be cancelled and the promissory note delivered up, but continued:⁴

It is now contended that, in addition to this relief, the plaintiff was entitled to an order for the repayment of the sum paid by him to the defendant as money paid under a contract declared to be void. No doubt the words of s. 1 of the Infants' Relief Act, 1874, are strong and general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid.

¹ [1913] 2 K.B. 235, at p. 246. Cf. *Pearce v. Brain*, [1929] 2 K.B. 310, *per* Swift J. at p. 314.

² Cf. *Elder v. Kelly*, [1919] 2 K.B. 179, cited by Treitel (1957), 73 L.Q.R. 194. But this was a case of a contract void for illegality, to which different considerations apply. *Viz. infra*, p. 326.

³ (1889), 24 Q.B.D. 166.

⁴ At p. 167.

This case, however, has also been interpreted to mean that the money is only recoverable where there has been a total failure of consideration.¹

In one respect the Act appears to have put the infant in a position which is less favourable to him than that which he enjoyed at common law. It will be remembered that, at common law, he could enforce the contract by suing for damages, even though it could not be enforced against him. But it is difficult to see how he can enforce a contract which the Act declares to be 'absolutely void'. For that to happen, it would be necessary to construe these words as meaning merely 'void as against the infant'. Such a construction has been suggested,² but the better opinion is that the contract is unenforceable by either party.

Negative Voidable Contracts

The second section of the Act makes it impossible for a person of full age to be sued on a contract entered into during infancy, even though he ratifies such a contract and even though there is some new consideration for the ratification. This can only affect the class of contracts described before as 'negative voidable contracts' which required express ratification after majority. These, of course, include those now rendered 'absolutely void' by section 1; but they also comprehend many other contracts, for example, contracts to marry and other promises of performance by the infant.

We must now note some points which are not quite obvious on reading the section.

¹ *Pearce v. Brain*, [1929] 2 K.B. 310. The law is far from clear. Three solutions seem to be possible: (i) that the test is 'Has the infant received any benefit under the contract?' If so, he cannot recover: *Everett v. Wilkins* (1874), 29 L.T. 846, and *Valentini v. Canali* (*supra*). In which case an infant who received goods, but never used them, might still recover the money paid as he had received no benefit.

(ii) that the test is 'Has there been a total failure of consideration?': *Pearce v. Brain* (*supra*). In which case, if goods are sold and delivered to an infant, then whether he consumes or uses them or not, he cannot recover the price, for he has received the very consideration for which he bargained.

(iii) that the test is 'Is *restitutio in integrum* possible?': *Valentini v. Canali* (*supra*). So if the infant can return the goods in the same condition, he can recover the price.

The first solution seems the most probable; but see (1957), 73 L.Q.R. 202; (1958), 74 L.Q.R. 97, 104.

² See Cheshire and Fifoot, *The Law of Contract* (4th ed.), p. 340; Simpson, *Infants* (4th ed.), ch. 2; Treitel (1957), 73 L.Q.R. 200; (1958), 74 L.Q.R. 104; Atiyah (1958), 74 L.Q.R. 97.

Infant can
enforce
contract

In the first place, it should be noted that, though the infant cannot now make a contract enforceable against himself by ratifying it after full age, this section does not affect his right to enforce it against the other party. It may be, as has already been said, that section 1, by making the contracts to which it relates 'absolutely void', has made it impossible for the infant to sue on those contracts either during infancy or, if he ratifies them, after full age. But with this exception, the position as regards the enforcement of his contracts by an infant remains as it was at common law.

Distinction
between
debts and
other
promises
Debts

Secondly, the section distinguishes between debts contracted during infancy and other promises or contracts made by him during the same period.¹

In the case of debts, it provides that 'no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy'. A debt contracted during infancy cannot be revived either by a ratification after full age or by a fresh promise to pay. This is illustrated by *Smith v. King*:²

King, an infant, became liable to a firm of brokers for £547. After he came of age they sued him, and he compromised the suit by giving two bills of exchange for £50. The firm indorsed one of the bills to Smith, who took the bill with knowledge of all the circumstances, and sued upon it.

The Queen's Bench Division held that, even if the bills were a fresh promise, based on a new consideration, to pay a debt contracted during infancy, there was here a situation of the sort contemplated by the Act, and that Smith could not recover.

Other
promises

On the other hand, in respect of contracts other than those giving rise to a debt, the Act merely provides that these cannot be *ratified* after majority. So, although they cannot, as previously, be rendered enforceable by ratification after full age, they can become binding if there is a new promise to perform the same contract.

The difficulty, however, in such cases of distinguishing between the ratification of an old promise and the making of a new one has led to some extreme refinements. This may be illustrated by examples relating to an infant's promise to marry. Where parties to mutual promises of marriage remain on the footing of an engaged couple after the promisor has attained his majority, the maintenance of the engagement has

been held to be a ratification and therefore insufficient to sustain an action for breach of the promise.¹ But where the mutual promises made during infancy are conditional on consent of the man's parents, and the promise is renewed by him after majority with their consent;² or where an engagement is made during infancy with no date fixed for the marriage, and after attaining majority the parties agree to name a day on which it shall take place,³ the promises so made have been held to be new promises and the breach of them is actionable. The question whether there has been a new promise or only a ratification of a promise made during infancy is, however, one of fact for the jury.

Positive Voidable Contracts

Where an infant acquires an interest in permanent property to which obligations attach, or enters into a contract involving continuous rights and duties, benefits and liabilities, and takes some benefit under the contract, he will be bound, unless he expressly disclaims the contract during infancy or within a reasonable time of attaining his majority. Contracts valid until rescinded

This rule has not been affected by the Infants' Relief Act, 1874, or by subsequent legislation.

Examples of an interest in permanent property are the possession of shares in a company, or an interest in land. Up to the time that the infant repudiates such a contract he will be bound to carry out the obligations under it, provided that these accrue before repudiation.⁴ He cannot renounce his liabilities until he renounces his interest. So an infant lessee is liable for rent until he disclaims the lease,⁵ and an infant shareholder is under a similar liability in respect of calls on his shares until he repudiates them.⁶ In *North Western Railway Co. v. M'Michael*:⁷

¹ *Coxhead v. Mullis* (1878), 3 C.P.D. 439.

² *Northcote v. Doughty* (1879), 4 C.P.D. 385.

³ *Ditcham v. Worrall* (1880), 5 C.P.D. 410.

⁴ There is some doubt as to whether an infant is bound to pay unpaid calls which accrued due before the repudiation, but the better opinion is that he is so bound. See *Cork & Bandon Railway v. Cazenove* (1847), 10 Q.B. 935. Cf. *North Western Railway Co. v. M'Michael* (*infra*), at p. 125, and *Newry and Enniskillen Railway v. Coombe* (1849), 3 Ex. 565.

⁵ *Blake v. Concannon* (1870), 4 Ir.C.L. 320. By s. 1 (6) of the Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), an infant can no longer hold a legal estate in land; but he can have an equitable interest, and so be bound in the same way.

⁶ *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452.

⁷ (1850), 5 Ex. 114, affirmed *sub nom. London and North Western Railway Co. v. M'Michael* (1850), 5 Ex. 855.

To an action for calls on railway shares, the defendant pleaded that at the times of application for and allotment of the shares, he was still an infant, and at the time of making the calls in question he was still within the age of twenty-one years.

It was held that, in the absence of a plea that he had expressly repudiated the shares, the defence failed and he was bound. Parke B. thus explained the basis of the liability of infant shareholders:¹

In truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.

Partnership The position of an infant member of a partnership differs from that of an infant shareholder. It is true that partnership is a continuous relationship between the partners, but by becoming a partner an infant does not acquire an interest in a subject of a permanent nature to which obligations are attached. He is not liable either during minority or after majority, and whether or not he disclaims the partnership, to creditors of the firm for debts incurred by it during his infancy.² If he continues to act as a partner after majority he will be liable, equally with his co-partners, for the debts subsequently incurred, and he may also make himself liable for such debts if, though ceasing to act as a partner, he does not give adequate notice of his withdrawal to persons dealing with the firm.³ His liability in this case, however, merely illustrates a general rule of the law of partnership applicable to any retired partner, and does not depend on any principle peculiar to the law of infancy.

Time of disclaimer In order that an infant's disclaimer of a permanent interest may take effect, the contract must be repudiated during infancy

¹ At p. 123.

² *Lowell and Christmas v. Beauchamp*, [1894] A.C. 607, although equity will not allow an infant, in taking partnership accounts, to claim to be credited with profits and not debited with losses.

³ *Goode v. Harrison* (1821), 5 B. & Ald. 147.

or within a reasonable time of his coming of age. What is a reasonable time will depend upon the circumstances of each particular case. In *Edwards v. Carter*:¹

An infant became a party to a marriage settlement under which he took considerable benefits. He covenanted to bring into the settlement any property which might come to him under his father's will. A year after his father's death he purported to repudiate the settlement. He was then twenty-five years of age.

The House of Lords held that a contract of this nature was binding unless repudiated within a reasonable time of attainment of majority, and that he was too late.

The effect of a valid disclaimer of such a contract is to release the infant from his future obligations under it. But it will not entitle him to recover anything that he may have already paid under the contract unless there has been a total failure of the consideration for which the money has been paid. In *Steinberg v. Scala (Leeds), Ltd.*, for example:²

Effect of disclaimer

An infant was allotted shares in a company, and paid the amounts due on application and allotment, and also on the first call. She received no dividends and attended no meetings of the company, and after eighteen months she claimed to repudiate the allotment and recover the amounts paid.

It was held by the Court of Appeal that, while she was entitled to rescind the contract by having her name removed from the register of shareholders, and thus to avoid liability for the unpaid instalments, she was not entitled to recover back what she had already paid. It was immaterial whether or not she had received any real advantage in the way of dividends or a share of the assets. She had received something which had a marketable value and which was, in any case, 'the very consideration for which she had bargained'.

Contracts for Necessaries

It has already been stated that, at common law, the only class of contract which was not voidable at the option of an infant was a contract for 'necessaries'. The meaning of the term 'necessaries', however, requires further explanation, and it will be convenient in this respect first to consider contracts

Necessaries

¹ [1893] A.C. 360. See also *Re Yeland's Consols* (1888), 58 L.T. 922; *Whittingham v. Murdy* (1889), 60 L.T. 956; *Carter v. Silber*, [1892] 2 Ch. 278; *Carnell v. Harrison*, [1916] 1 Ch. 328.

² [1923] 2 Ch. 452; *Holmes v. Blogg* (1818), 8 Taunt. 508.

for necessary goods, and then contracts of service, apprenticeship, and other agreements beneficial to the infant.

(a) *Contracts for necessary goods*

Necessary
goods

When a contract 'for goods supplied or to be supplied' is a contract for necessities, it is expressly excepted from the operation of section 1 of the Infants' Relief Act, 1874, and is therefore still governed by the rules of common law. But a part of the common law on this matter has been given statutory form by section 2 of the Sale of Goods Act, 1893,¹ which enacts as follows:

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessities are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition of life of such infant or other person, and to his actual requirements at the time of the sale and delivery.

What are
necessaries?

We must first consider what the word 'necessaries' includes. It has always been held that an infant may render himself liable for the supply to him, not merely of the necessities of life, but of things suitable to his station in life and to his particular circumstances at the time. The *locus classicus* on this subject is the judgment of Bramwell B. in *Ryder v. Wombwell*²—the conclusions of which were adopted by the Exchequer Chamber. In such cases the provinces of the Court and of the jury are as follows: Evidence being given of the things supplied and of the circumstance and requirements of the infant, the Court determines whether the things supplied can reasonably be considered necessities at all; and only if it comes to the conclusion that they can, may the case be submitted to the jury.

Obvious
non-
necessaries

Certain things may be obviously outside the range of possible necessities, 'Ear rings for a male, spectacles for a blind person, a wild animal, . . . a daily-dinner of turtle and venison for a month for a clerk with a salary of £1 a week'.³ So in *Ryder v. Wombwell*:²

The defendant, an infant with an income of £500 a year, bought from the plaintiff a pair of crystal, ruby and diamond solitaires and an antique goblet in silver gilt.

¹ 56 & 57 Vict., c. 71.

² (1868) L.R. 3 Ex. 90, affirmed (1869), L.R. 4 Ex. 32.

³ *Ibid.*, per Bramwell B. at p. 96.

It was held that neither of these articles could be a necessary, even though the defendant was the son of a deceased baronet and 'moved in the highest society'. The case ought to have been withdrawn from the jury. Other things may be of a useful character but the quality or quantity supplied may take them out of the character of necessities. Elementary textbooks might be necessary to a student of law, but not a rare edition of Littleton's *Tenures*, or eight or ten copies of the present textbook. In *Nash v. Inman*:¹

A tailor supplied a Cambridge undergraduate with clothing which included eleven fancy waistcoats at two guineas each. It was proved that, although he was an infant, he had already a sufficient supply of clothing according to his position in life.

The Court of Appeal held that the tailor had failed to prove that the clothing was suitable to his actual requirements at the time of the sale and delivery. Necessaries also vary according to the station in life of the infant or his peculiar circumstances at the time. It does not follow, therefore, that because a thing is of a useful class, a judge is bound to allow a jury to say whether or not it is a necessary.

But if the judge concludes that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessities, he leaves it to the jury to say whether, in the circumstances of the case, the things supplied were necessities in fact. Thus in *Peters v. Fleming*² it was held that the trial judge was correct in leaving to a jury the question whether some gold rings and a gold watch chain were necessities for a wealthy Cambridge undergraduate. The jury must take into consideration the character of the goods supplied, the actual circumstances of the infant, and the extent to which the infant was already supplied with them. It is necessary to emphasize the words 'actual circumstances', because a false impression conveyed to the tradesman as to the station and circumstances of the infant will not affect the infant's liability. If a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class not knowing that the infant is already sufficiently supplied, he does so at his peril.³

The Sale of Goods Act, 1893, section 2, also requires that the goods should be necessary to the infant 'at the time of the

¹ [1908] 2 K.B. 1.

² (1840), 6 M. & W. 42.

³ The burden of proof is on him: *Nash v. Inman* (*supra*).

When
question
left for
jury

Sale of
Goods Act,
s. 2

sale and delivery'. At first sight, this might seem to indicate that the seller would have to prove them to be necessary at both of these times. If, therefore, an infant bought clothing from a tradesman, and, between the time of the sale and the time of delivery, he received a large supply of clothing from a rich uncle, or if he was adequately supplied at the time of the sale, but lost the rest of his clothing in a fire before delivery, it could be argued that these events would make a substantial difference to his liability. But, as we shall see later,¹ it is probable that this is simply a reference to the action for goods sold and delivered, which is the normal action for a seller who wishes to recover the purchase price. He would have to prove them to be necessary at the time of delivery alone.

Loan for necessities A loan of money to an infant to pay for necessities was not recoverable at common law, for 'it may be borrowed for necessities, but laid out and spent at a tavern'.² But in equity it was held that if an infant borrowed money to pay a debt for necessities, and the debt was actually paid therewith, the lender stood in the place of the person paid and was entitled to recover the money lent.³ This rule, a branch of the equitable doctrine of subrogation, has most probably survived the prohibition relating to loans to infants in section 1 of the Infants' Relief Act.⁴ It is not possible, however, to sue an infant on a negotiable instrument given for the price of necessities,⁵ even though it may have been negotiated to a third party.⁶ Also an account stated with an infant is still void although the items in the account may consist of necessities.⁷

(b) Contracts of service, apprenticeship, and other beneficial contracts

The proviso to s. 1 Contracts into which an infant may enter 'by any existing or future statute, or by the rules of common law or equity', and which were not voidable at the date of the enactment, are taken out of the Act by the proviso to section 1.

¹ *Infra*, p. 186. See also Winfield (1942), 58 L.Q.R. 82.

² *Earle v. Peale* (1711), 1 Salk. 386 (except where necessities purchased at infant's request). ³ *Marlow v. Pitfield* (1719), 1 Peere Wms. 558.

⁴ *Martin v. Gale* (1876), 4 Ch. D. 428; *Lewis v. Alleyne* (1888), 4 T.L.R. 560. See also the proviso to s. 1 of the Act of 1874. Cf. Treitel (1957), 73 L.Q.R. 194.

⁵ *Williams v. Harrison* (1691), Carth. 160; Bills of Exchange Act, 1882 (45 & 46 Vict., c. 62), s. 22; Betting and Loans (Infants) Act, 1892 (55 & 56 Vict., c. 4), s. 5. ⁶ *Re Soltykoff, ex parte Margrett*, [1891] 1 Q.B. 413.

⁷ *Williams v. Moor* (1843), 11 M. & W. 256.

As was pointed out by Kekewich J. in *Duncan v. Dixon*,¹ the meaning of this proviso is obscure. We have to find a contract which is not one for the supply of goods necessary to an infant (for these the section had already excepted), and which yet was not voidable by the infant before the Act. Such a class of contract does exist, but it is a class which the section would not in any case, even if the proviso had not been inserted, have affected; for the contracts which it includes do not belong to any of the three specific kinds of contract which the operative words of the section invalidate. We can only suppose that the proviso was inserted *ex majore cautela* to ensure that these contracts should not be affected.

Instances of the class of contract in question are to be found where an infant enters into a contract of service so as to provide himself with the means of self-support, or one for the purpose of obtaining instruction or education to fit himself to earn his living at a suitable trade or profession. Such contracts are in fact contracts for 'necessaries' in a wider sense, and are so described in the cases. In *Clements v. London and North Western Railway Company*, Kay L.J. said:²

Contracts
of service
and
apprentice-
ship

It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the Court before which the question comes will not allow the infant to repudiate it.

Provided that they are beneficial to the infant, these contracts can be enforced against him. In the case just cited, an infant entered into a contract of service with a railway company, promising to accept the terms of an insurance against accidents in lieu of his rights of action under the Employers' Liability Act, 1880. It was held that the contract was, taken as a whole, for his benefit and that he was bound by his promise.

On the other hand, a contract of this class which is more onerous than beneficial to the infant will impose no liability upon him. So where an infant, upon entering the service of a Sheffield newspaper, agreed never during the rest of his life to become connected with any other newspaper within twenty miles of Sheffield, it was held in *Leng (Sir W. G.) & Co. v. Andrews*³ that he might repudiate the agreement, apart

¹ (1890), 44 Ch. D. 211.

² [1894] 2 Q.B. 482, at p. 491.

³ [1909] 1 Ch. 763.

altogether from the question whether it was void as being in restraint of trade. Also in *De Francesco v. Barnum*:¹

By an apprenticeship deed between an infant, aged fourteen years, and the plaintiff, the infant bound herself apprentice to the plaintiff in 'the art of choreography' for seven years. The plaintiff was to teach her stage dancing, and during the period of apprenticeship the infant was not to take any professional engagement without the consent of the plaintiff, nor was she to marry. She was to receive certain payments for any performances she might give, but there was no provision for any other remuneration and the plaintiff did not undertake to find her any engagements. The effect of the deed was to place the infant entirely at the disposal of the plaintiff.

Fry L.J. held that the contract was not beneficial to the infant and could not be enforced against her. It should, however, be noted that even though an infant's contract of service contains some stipulations which are onerous to the infant, he cannot necessarily repudiate it, still less select which terms he will or will not follow.² As Fry L.J. put it in the same case:³

It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial.

Other
beneficial
contracts

The class of contracts under consideration is not, however, limited to contracts of apprenticeship and service. It includes numerous contracts for 'necessaries' other than goods, for example, for medical attendance,⁴ for the preparation of a marriage settlement by a solicitor,⁵ or the hire of a car to fetch an infant's luggage from the station.⁶ Provided that these are reasonable and beneficial to the infant, they can be enforced against him. Yet the class does not include ordinary trading contracts, as, for instance, the hire-purchase of a motor lorry by an infant haulage contractor.⁷ Such contracts may be necessary to the infant's business, and so of benefit to him, but

¹ (1890), 45 Ch. D. 430.

² *Slade v. Metrodent, Ltd.*, [1953] 2 Q.B. 112.

³ (1890), 45 Ch. D. 430, at p. 439.

⁴ *Dale v. Copping* (1610), 1 Bulst. 39.

⁵ *Helps v. Clayton* (1864), 17 C.B., N.S. 553.

⁶ *Fawcett v. Smethurst* (1914), 84 L.J.K.B. 473.

⁷ *Mercantile Union Guarantee Corporation v. Ball*, [1937] 2 K.B. 498.

they are not binding upon him. Thus, in *Cowern v. Nield*,¹ an infant hay and straw dealer was held entitled to retain money paid to him as the price of a consignment of hay which he had failed to deliver in accordance with his contract. The contract was a trading contract, and so could not be for 'necessaries'.

The class is thus a limited one although the limits are not easy to state. In *Doyle v. White City Stadium, Ltd.*,² for instance:

A professional boxer, who was an infant, in consideration of his receiving a licence from the British Boxing Board of Control, agreed to be bound by the rules of the Board in all his professional engagements.

It was held that the contract was binding on him despite his being an infant. The ground of this decision was that this licence was practically essential in order to enable him to become proficient in his profession, and when the conditions attached to the issue of the licence were incorporated in a particular beneficial contract of employment—in this case, an engagement to box for a heavyweight championship—both contracts became binding on the infant, as they were both for his benefit. The judgments in this case do not set out to define the contracts which are binding on an infant when beneficial to him, but they perhaps indicate a tendency to enlarge the class; for it might be thought that the contract which the infant had made in this case was merely one incidental to the carrying on of a trade or profession and therefore of a kind which had not hitherto been believed to be binding, even when beneficial.

Nature of Infant's Liability for Necessaries

It remains to consider the nature of an infant's liability for necessities, as to which some doubt exists. Two theories have been put forward. Ground of liability

The first is that the liability arises *re*, that is to say, it is not contractual but quasi-contractual. The obligation is imposed by the law because the infant has actually received the benefit of performance, and not because he has entered into a valid contract. This was the view taken by Fletcher Moulton L.J. in *Nash v. Inman*:³ may be *re*

An infant like a lunatic is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessities, the law will imply an obligation to repay him for the services so rendered and will enforce that

¹ [1912] 2 K.B. 419.

² [1935] 1 K.B. 110.

³ [1908] 2 K.B. 1, at p. 8.

obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*.

or *consensu*

The second theory, as may be gathered, asserts that the infant's liability arises *consensu*, that is to say, it is contractual. The infant can, it is said, enter into a valid contract for necessities just like any other person. 'The plaintiff', said Buckley L.J. in the same case,¹ 'when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make.'

The problem is not wholly an academic one, since the liability of an infant upon an executory contract for necessities will depend upon which of these two theories is adopted. The better view seems to be that the obligation arises *re*, and that no action can be maintained against an infant in respect of an executory contract for necessities, at any rate where necessary goods are concerned. The Sale of Goods Act deals only with 'necessaries sold and delivered', and says nothing of necessities sold to an infant and not delivered, that is to say, of a contract of sale which is still executory.² If, therefore, his liability still rests on the common law, there does not seem to be a single case in which an infant has been held liable for the non-acceptance of necessities or on a contract for necessities bargained and sold.³ Moreover it must be noted that, even if the goods are delivered, the plaintiff will not necessarily recover the contractual price but only 'a reasonable price therefor'. This does not suggest a consensual contract.⁴

Contracts of service, apprenticeship and the like, provided that they are beneficial to the infant, have, however, always been regarded as merely one variety of his contracts for 'necessaries', and there seems to be no authority for regarding the nature of the liability which they create as resting on a different basis from that of contracts for the supply of necessary goods. Nevertheless in *Roberts v. Gray*:⁵

¹ At p. 12.

² In s. 2. On the other hand, the wording of the Infants' Relief Act, 1874, s. 1, might suggest the contrary: 'contracts . . . for goods supplied or to be supplied (other than necessities)'. See generally Winfield (1942), 58 L.Q.R. 82.

³ Sir John Miles (1927), 43 L.Q.R. 389.

⁴ *Ponrydd Union v. Drew*, [1927] 1 K.B. 214, per Scrutton L.J. at p. 220.

⁵ [1913] 1 K.B. 520.

The defendant, an infant, entered into a contract by which he agreed to join the plaintiff, a famous billiard player, in a world tour as 'professional billiardists'. The plaintiff incurred certain necessary expenses as a result of preparations for the tour, but, before the tour began, the defendant repudiated the contract.

The Court of Appeal held that to play in company with a noted billiard player like the plaintiff was instruction of the most valuable kind for an infant who wished to make billiard playing his occupation, and they upheld an award of £1,500 damages for the breach. They rejected the view that a contract for necessities in this wider sense was not binding on an infant while it was still executory. 'I am unable to appreciate', said Hamilton L.J.,¹ 'why a contract which is in itself binding, because it is a contract for necessities not qualified by unreasonable terms, can cease to be binding because it is still executory.' Both this decision, then, and that in *Doyle v. White City Stadium, Ltd.*,² imply that the nature of an infant's liability, when he is liable on the contract at all, does not differ from that of a contracting party of full capacity; that it is, in fact, a true contractual liability, arising *consensu* and not merely *re*. These cases may have introduced an innovation into the law, but in the present state of the authorities it is difficult to state the nature of the infant's liability with assurance.

Liability of Infants in Tort

An infant is generally liable for his torts, but a breach of contract may not be treated as a tort so as to make the infant liable; the tort must be more than a misfeasance in the performance of a contract, and must be separate from and independent of it.

Infant may not be charged on a contract framed as a tort

Thus in *Jennings v. Rundall*,³ where an infant hired a mare to ride and injured her by over riding, it was held that he could not be made liable by framing an action really arising out of contract as an action in tort for negligence. And in *Fawcett v. Smethurst*,⁴ it was said that an infant who hired a car to take his luggage from the station would be under no liability in tort if he used the car to drive several miles farther than the station, and there met with an accident. An infant who obtains a loan by falsely representing his age cannot be

¹ At p. 530.

² [1935] 1 K.B. 110; *supra*, p. 185.

³ (1799), 8 Term R. 335.

⁴ (1914), 84 L.J.K.B. 473, although in that case the infant was, in fact, not guilty of any tort. See also *Dickson Bros. Garage & U Drive v. Woo Wai Jing* (1958), 11 D.L.R. (2d) 477.

made to repay the amount of the loan in the form of damages for deceit,¹ nor can one who buys goods on credit be forced to pay for them by charging him in trover or conversion.² 'One cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto*.'³

But this is not to say that every tort of an infant which originates in a contract is not actionable. If the wrongful action is of a kind not contemplated by the contract,⁴ the infant may be exposed to tortious liability. The leading case is that of *Burnard v. Haggis* in 1863:⁵

An infant hired a mare for riding. He was given strict instructions 'not to jump her'. He lent her to a friend who jumped and killed her.

It was held that the infant was liable, for, as Willes J. said:⁶

It appears to me that the act of riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring.

In a more modern case,⁷ an infant was successfully sued in detinue for the non-return of a microphone and amplifier which he had hired from the plaintiff and improperly parted with to a friend. The Court of Appeal held that 'the circumstances in which the goods passed from his possession and ultimately disappeared were outside the purview of the contract of bailment altogether',⁸ and the infant was liable. In considering the extent of the contract, it seems that the terms of the agreement, the presence or absence of an express prohibition, and the nature of the subject-matter of the contract must all be considered to be relevant, although not necessarily determining, factors.

¹ *Johnson v. Pye* (1665), Sid. 258; *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90; *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607.

² *Manby v. Scott* (1659), 1 Sid. 109, at p. 129.

³ *Burnard v. Haggis* (1863), 32 L.J.C.P. 189, per Byles J. at p. 191, cited by Lord Sumner in *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607, at p. 611.

⁴ *Burnard v. Haggis* (1863), 14 C.B., N.S. 45, per Willes J. at p. 53; *Fawcett v. Smethurst* (1914), 84 L.J.K.B. 473, per Atkin J. at p. 474; *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607, per Kennedy L.J. at p. 620; *Ballett v. Mingay*, [1943] K.B. 281, per Lord Greene M.R. at p. 283.

⁵ (1863), 14 C.B., N.S. 45.

⁶ At p. 53.

⁷ *Ballett v. Mingay*, [1943] K.B. 281.

⁸ *Ibid.*, at p. 283.

An infant can only be made liable in quasi-contract (by the action for money had and received) if there is a wrong quite independent of the contract;¹ otherwise infancy affords a good defence.²

Misrepresentation of Full Age

Where an infant falsely represents himself to be of full age and thereby induces another person to enter into a contract with him, that contract is still unenforceable against him despite his fraud. Equity, however, does not stand idle and will, in certain circumstances, intervene in order to prevent the infant from taking advantage of his own deceit. 'Minors', said Lord Chancellor Thurlow,³ 'are not allowed to take advantage of infancy to support a fraud.' This equitable intervention is distinct and separate from the contract and therefore any obligation imposed on the infant is not affected by the Infants' Relief Act. The principle has been succinctly stated by Lord Sumner in *Leslie (R.), Ltd. v. Sheill*:⁴

Equitable remedies against infant

When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud.

It should not be supposed, however, that equity will always provide a remedy where the infant has misrepresented his age. It will only relieve in certain situations.

(a) *Equitable restitution*

The exact extent of this remedy is the subject of some dispute. It is clear that an infant who obtains property, whether consisting of goods or money or any other security, by means of a false representation of full age, can be compelled to restore that property to the person deceived, provided that it is identifiable and still in his possession. It is equally clear that it is impossible to make him repay a loan of money which he has borrowed by such a fraud and subsequently spent. In the

Restitution

¹ *Cowern v. Nield*, [1912] 2 K.B. 419.

² *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607.

³ *Earl of Buckinghamshire v. Dreiry* (1760), 2 Eden 71.

⁴ [1914] 3 K.B. 607, at p. 618.

words of Lord Sumner in *Leslie (R.), Ltd. v. Sheill*:¹ 'Restitution stops where repayment begins.' In that case:

The plaintiffs were a firm of registered moneylenders, and they sued the defendant, to whom they had made two loans of £200 each, to recover £475, being the amount of the loans with interest. At the time of obtaining the loans, the defendant was an infant, but he had falsely represented to the plaintiffs that he was of full age.

The Court of Appeal held that no action could be maintained for the recovery of the money. The infant could not be forced to repay a loan rendered void by the Infants' Relief Act:²

The money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract.

Once the identity of the property has been lost because it has been dissipated, it is no longer possible to invoke the aid of the equitable doctrine of restitution.

So much is clear; the difficulty arises when the infant has parted with the property obtained by his fraud, but stands possessed of other money or property which represent it. Suppose, for example, that an infant obtains certain goods by his misrepresentation, and then sells the goods and stands possessed of the proceeds of sale. Is it possible to claim that the money represents the goods and so ought to be restored to the person deceived? In *Stocks v. Wilson*:³

The defendant, an infant, by falsely representing himself to be of full age, induced the plaintiff to sell and deliver to him certain furniture and other articles, and promised to pay therefor the sum of £300. The goods were not necessities. He subsequently sold some of the goods for £30, and granted a bill of sale over the remainder as security for the sum of £100 lent to him by a third party. These goods were later sold by him to the grantee of the bill of sale. The plaintiff claimed, by way of equitable relief, the value of the goods.

Lush J. held that the plaintiff was not entitled to recover the value of the goods from the infant as this would be to enforce a void contract. Equity, however, had the power to prevent an

¹ [1914] 3 K.B. 607, at p. 618. 'You take the property to pay the debt': *Vaughan v. Vanderstegen* (1854), 2 Drew 363, per Kindersley V.-C.

² *Ibid.*, per Lord Sumner at p. 619.

³ [1913] 2 K.B. 235.

infant from retaining the benefit of what he had obtained by reason of his fraud, and since he had obtained the sum of £130 by parting with the goods, he was liable to account to the plaintiff for this sum. This decision was criticized, but not overruled, by the Court of Appeal in *Leslie (R.), Ltd. v. Sheill* on the ground that Lush J. had proceeded on the false assumption that an infant who had obtained money by a false representation of full age could be compelled to refund it. The two decisions may, perhaps, be reconciled on the assumption that it is possible for the party defrauded to 'trace' the value of the goods into the proceeds of their sale.¹ If this is so, then his right is similar to that of a beneficiary in respect of a trust fund in the hands of a trustee.² He can trace so long as there is an identifiable fund in existence against which he can enforce his claim; but, once the fund has been dissipated, it is no longer possible to obtain a judgment *in personam* against the infant for the amount.

(b) *Other equitable relief*

Equity will also relieve the party deceived of obligations imposed upon him by the infant's fraud. In *Lemprière v. Lange*,³ an infant obtained a lease by falsely representing himself to be of full age. The Court ordered that the lease should be set aside and that the infant should give up possession of the premises. In *Clarke v. Cobley*⁴ the Court ordered the return of two promissory notes which the infant had obtained by misrepresenting his age and in return for a void bond executed by him. In both cases the Court scrupulously refrained from enforcing the contract, and merely restored the *status quo* affected by the infant's fraud. In such cases as these, the judge may mark his disapproval of the infant's conduct by refusing him costs,⁵ or even by awarding costs against him.⁶

Where an infant falsely misrepresents his age and thereby induces others to lend him money, they are entitled to prove in

¹ *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607, at p. 618. It must, however, be admitted that such an interpretation of *Stocks v. Wilson* is a difficult one, since the proceeds of sale appear to have been spent and the infant was bankrupt.

² See Snell's *Principles of Equity* (24th ed.), p. 229. The representation of full age might be considered to raise an 'equity' in the defrauded party similar to that possessed by a beneficiary of a fiduciary relationship.

³ (1879), 12 Ch. D. 675.

⁴ (1789), 2 Cox 173.

⁵ *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607.

⁶ *Lemprière v. Lange* (1879), 12 Ch. D. 675; *Woolf v. Woolf*, [1899] 1 Ch.

any bankruptcy proceedings taken against the infant after he comes of age.¹ The reason seems to be that they have a claim, not against him personally, but against his assets in competition with his other creditors.²

Comment

Unsatisfactory
state of law
concerning
infants'
contracts

It cannot be said that the law relating to infant's contracts is entirely satisfactory. Besides the difficulties inherent in the actual wording of the Infants' Relief Act, 1874, the Act itself appears to be an unsuccessful compromise between a desire to protect infants on the one hand and a wish to safeguard the interests of traders on the other. It does little to discourage the more obvious types of adolescent misconduct. There is a general tendency among infants to purchase articles which they can ill afford with money they have not got. As the law stands, an infant who buys an expensive and non-necessary article for cash cannot repudiate the transaction by returning the object bought and recovering the purchase price, at any rate if he has had some use or benefit from it.³ And if he has persuaded the shopkeeper to give him credit, it seems that he can keep the article and refuse to pay for it. Further, he is protected from a more honourable, if transitory, change of mind upon attaining his majority by the provision in section 2 of the Act which invalidates any subsequent promise or ratification. The most sensible solution would be to allow the infant the alternative of returning the object and recovering the price paid (with, or without, a set-off for depreciation), or of affirming the transaction and paying the purchase price. This was the position reached by Roman law,⁴ and it would avoid some of the more obvious injustices of the present system.

III. CORPORATIONS

The limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express. The very nature of a corporation imposes some restrictions upon its contractual power (e.g. it cannot contract to marry), and the terms of its incorporation may impose others.

¹ *Re King, ex p. Unity Joint-Stock Mutual Banking Association* (1858), 3 De G. & J. 63.

² *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607, *per* Lord Sumner at p. 616. Cf. *Re Jones, ex p. Jones* (1881), 18 Ch. D. 109.

³ *Valentini v. Canali* (1889), 24 Q.B.D. 166; *supra*, p. 174.

⁴ Digest, 12.6.13.1.

Necessary Limitations

A corporation has an existence in law separate and distinct from that of the individuals who compose it; their corporate rights and liabilities are something apart from their individual rights and liabilities; they do not of themselves constitute the corporation, but are only its members for the time being. Thus a corporation, having this legal existence apart from its members, is impersonal, and must contract either by means of a servant or agent or by an act or resolution of its chief officers in accordance with its internal constitution. It should not be supposed, however, that because a corporation is, in this respect, impersonal, it cannot be guilty of an intentional or fraudulent act, such as a fraudulent misrepresentation.¹ The intent to deceive existing in the mind of the person concerned in the transaction will be imputed to the corporation and the corporation will be held liable.

Necessary
limits to its
contractual
capacity

Express Limitations

The express limitations imposed by law on the contractual capacity of corporations are twofold: (a) those which spring from the doctrine of *ultra vires*, and (b) those imposed by certain requirements of form.

Express
limits

(a) The 'ultra vires' doctrine

A corporation created by charter in virtue of the Royal prerogative can deal with its property, or bind itself by contract like an ordinary person, and even though the charter may impose limitations on its actions, these do not impair its capacity. If they are exceeded, the effect is not to avoid the contract, but to give cause for a forfeiture of the charter by the appropriate procedure.²

Doctrine of
ultra vires

But a corporation created by or in pursuance of statute is limited to the exercise of such powers as are actually conferred, or may reasonably be deduced from the language of the statute.³ Thus a company incorporated under the Companies Act, 1948,⁴ is bound by the conditions set out by the founders of the company in its memorandum of association. The com-

¹ For the most illuminating approach to the problem of corporate personality see Professor Hart (1954), 70 L.Q.R. 37, at p. 49.

² By *scire facias*, as in the case of the South Sea bubble companies. See Professor Gower (1952), 68 L.Q.R. 214.

³ *Osborne v. Amalgamated Society of Railway Servants*, [1910] A.C. 87.

⁴ 11 & 12 Geo. VI, c. 38.

pany may make no contracts inconsistent with, or foreign to, the objects set forth in the memorandum, and, if it does so, the contract so made is said to be *ultra vires* and void. The leading case is that of *Ashbury Railway Carriage and Iron Co. v. Riche*:¹

A company was incorporated with objects (set out in the memorandum of association) as follows: (i) to make, and sell, or to lend on hire, railway wagons and carriages and other rolling stock, (ii) to carry on the business of mechanical engineers and general contractors, (iii) to purchase, lease, work and sell mines, minerals, land and buildings, and (iv) to buy and sell as merchants, timber, coal, metals, or other materials. The company contracted to assign to another company a concession which it had bought for the construction of a railway in Belgium.

The House of Lords held that the contract, being related to the actual construction of a railway, as opposed to railway stock, was *ultra vires* the objects in the memorandum and void.

and its
effects

The purpose of the *ultra vires* doctrine is said to be to protect the shareholders, so that their money shall not be expended on activities of an unknown or speculative nature. Persons dealing with the company are presumed to have read the memorandum and to know the extent of the company's powers. If, therefore, they enter into a contract which is *ultra vires*, they cannot enforce it. If they have supplied goods to the company or performed services under the contract, they cannot obtain payment.² If they have lent money to the company and the loan is *ultra vires*, they cannot recover their money.³ In its turn, the company cannot recover money or other property transferred as a result of an *ultra vires* contract, nor can it enforce it in any way. Further, it is not possible for the shareholders, even unanimously, to ratify the contract and make it binding.⁴ All that they may do is to alter the memorandum of association, but not retrospectively, under certain conditions and within certain limits⁵ so as to validate any future contracts of the same nature.

¹ (1875), L.R. 7 H.L. 653.

² *Re Jon Beauforte (London), Ltd.*, [1953] Ch. 131; unless it can be traced after the claims of the other creditors have been satisfied: *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183.

³ *Wenlock (Baroness) v. River Dee Co.* (1885), 10 App. Cas. 354; although if the money is still identifiable it may be traced: *Sinclair v. Brougham*, [1914] A.C. 398, and money applied to the discharge of the company's debts may also be recovered: *Re Cork and Youghal Railway* (1869), L.R. 4 Ch. App. 748.

⁴ *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653.

⁵ Companies Act, 1948 (11 & 12 Geo. VI, c. 38), s. 5.

The effects of an *ultra vires* contract are therefore similar to those of a contract which is void for illegality. But Lord Cairns, in *Ashbury Railway Carriage and Iron Co. v. Riche*¹ took exception to the use of the term 'illegality' in respect of *ultra vires* contracts and pointed out that it is not the object of the contracting parties, but the incapacity of one of them, that avoids the contract.

(b) *Formal requirements*

A corporation can only be bound by contracts made under its corporate seal. This common law rule has, however, been eaten away by a number of exceptions, and may now be said to be honoured more in the breach than the observance. But it may still be of importance, as can be seen from *Wright (A. R.) & Son, Ltd. v. Romford Borough Council*:²

Need for sealed contracts

By an agreement in writing, but not under seal, the plaintiffs were engaged to demolish certain buildings for the defendant council. The council repudiated the contract, and the plaintiffs claimed damages. The council pleaded in defence that they were a body corporate, incorporated by Royal Charter, and that the agreement was not binding on them.

Lord Goddard C.J. held that, much as he disliked giving effect to such a technical defence, it was a valid defence in law and the action could not be maintained.

But the exceptions to this rule are now very numerous. Matters of trifling importance, or daily necessary occurrence, do not require the form of a deed. The supply of coals to a workhouse,³ or of gas by a gas company,⁴ the hire of an inferior servant—acts which recur too frequently, or are too insignificant to be worth the trouble of affixing the common seal⁵—furnish instances of such matters. And where a municipal corporation owned a graving dock in constant use, it was held that agreements for the admission of ships might be made by simple contract.⁶

Exceptions (i) contracts of daily occurrence

Trading corporations may, in addition, enter into simple contracts relating to the objects for which they were created. As Bovill C.J. ruled in *South of Ireland Colliery Co. v. Waddle*:⁷

(ii) trading corporations

¹ At p. 672.

² [1957] 1 Q.B. 431.

³ *Nicholson v. The Guardians of the Bradfield Union* (1866), L.R. 1 Q.B. 620.

⁴ *Church v. Imperial Gaslight and Coke Co.* (1838), 6 A. & E. 846.

⁵ *Ibid.*, per Lord Denman C.J. at p. 861.

⁶ *Wells v. Mayor of Kingston-upon-Hull* (1875), L.R. 10 C.P. 402.

⁷ (1868), L.R. 3 C.P. 463, at p. 469; affirmed (1869), L.R. 4 C.P. 617.

A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal.

In that case the Court upheld the claim of a colliery company against an engineer for the non-delivery of a pumping engine, even though the contract was not under seal.

(iii) **Com-**
panies Act,
s. 32 The Companies Act, 1948, section 32¹ (re-enacting a similar provision in earlier Acts) enables a company incorporated under the Companies Acts to enter, through its agents, into contracts in writing or by parol, in cases where such contracts could be entered into by private persons in like manner; and, by section 33 of the same Act, bills of exchange and promissory notes can be drawn, accepted, or endorsed on behalf of the company by any person acting under the company's authority.² Since companies incorporated under the Companies Act far exceed in number corporations of other kinds, the cases which are covered by the exceptions to the rule which requires a corporation to contract under seal are far more numerous than those to which the rule itself applies.

(iv) **exe-**
cuted con-
tracts Even in cases not covered by the above exceptions, a corporation will be liable where no contract has been made under seal, but where goods have actually been supplied, or work actually done, for the purpose for which the corporation exists. Thus in *Lawford v. Billericay R.D.C.*:³

The plaintiff was employed by the defendant council under their common seal to act as engineer in connection with certain sewerage work carried out by them. A committee of the council requested him to prepare plans and specifications relating to a district not included in his contract, and promised him certain remuneration for doing this. This agreement was not under seal. The plaintiff prepared the plans and specifications, but the council refused the promised payment.

The Court of Appeal held that they were bound to pay. The work done by the plaintiff was done in connexion with sewerage, a purpose for which the council had been created, and it had actually been executed by him. But it should be noted that breach of a contract not under seal which is still executory will

¹ 11 & 12 Geo. VI, c. 38.

² See also the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 91 (2), which allows a corporate seal to take the place of a signature.

³ [1903] 1 K.B. 772.

give no right of action to either party. It is the fact that the work has been carried out which imposes the obligation to pay. As will be seen later,¹ the liability of a corporation in such circumstances is not a liability under the contract, but one imposed by law. It is a quasi-contractual liability.

It appears that where a corporation has done all that it was bound to do under a simple contract it may in like manner sue the other party for a non-performance of his part.²

Trade Unions

A trade union stands juridically in a somewhat anomalous position. Although it is strictly unincorporate, if registered under the Trade Union Acts, 1871 and 1876,³ it is governed by some of the legal rules applicable to corporate bodies. It can, for example, sue and be sued in its own name⁴ and can become a plaintiff or a defendant in a contractual action. Indeed, a trade union seems to enjoy all those powers normally possessed by a juristic person except those solely characteristic of a natural person and those which are expressly excepted by the creating or enabling statute.⁵ But whether it is, in fact, a *persona juridica* distinct and separate from its members, or merely an association of individuals who can appear in their collective name, is still a matter for dispute. The question was considered by the House of Lords in *Bonsor v. Musicians' Union*.⁶

Position of
Trade
Union

B. was a musician and a member of the defendant union. He was wrongfully expelled from the union and was therefore unable to obtain work. He was even reduced to chipping rust from Brighton pier in order to gain a livelihood. His administratrix brought an action against the union claiming damages for breach of contract.

It was argued on behalf of the union that since a trade union was only a collection of individuals of whom B. was one, the official who broke the contract by expelling him was acting as agent for B. equally with his fellow members and so no action could be maintained.⁷ Their lordships unanimously rejected

¹ *Infra*, p. 561.

² *Fishmongers Company v. Robertson* (1843), 5 M. & G. 131, at p. 192.

³ 34 & 35 Vict., c. 31; 39 & 40 Vict., c. 22.

⁴ *National Union of General and Municipal Workers v. Gillian*, [1946] K.B. 81.

⁵ *Ibid.*, per Scott L.J. at p. 86.

⁶ [1956] A.C. 104.

⁷ *Kelly v. National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236 (overruled in *Bonsor's Case*).

this contention and held that an action lay. They differed, however, as to the nature of a trade union. Lord Morton and Lord Porter considered that it was a legal entity distinct from its members. Lord MacDermott and Lord Somervell held that it was not a juridical person but an association of individuals. Lord Keith adopted a compromise view that 'in a sense, a registered trade union is a legal entity, but not . . . a legal entity distinguishable at any moment of time from the members of which it is at that time composed'.¹ It is clear, however, that a trade union may now be sued for breach of contract both by persons outside the union and by its own members.

IV. LUNATIC AND DRUNKEN PERSONS

The contract voidable only if known to the other party The contract of a lunatic or drunken person is binding upon him unless it can be shown that at the time of making the contract he was wholly incapable of understanding what he was doing and that the other party knew of his condition. This principle was established by Lord Esher M.R. in *Imperial Loan Co. v. Stone*:²

When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

It does not seem to be certain whether this principle applies to a lunatic who has been found insane by inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930.

Ratification A person who makes a contract while in a state of intoxication known to the other party may also subsequently avoid the contract; but if it is confirmed by him it is binding on him. In *Matthews v. Baxter*:³

The defendant, while drunk, agreed at an auction sale to purchase from the plaintiff certain houses and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain. When sued on the contract, he pleaded that he was drunk at the time he made it, and to the plaintiff's knowledge.

The Court held that although he had once an option in the matter and might have avoided the contract, he was now

¹ At p. 149.

² (1873), L.R. 8 Ex. 132.

³ [1892] 1 Q.B. 599, at p. 601.

bound by his affirmation of it. 'I think', said Martin B.,¹ 'that a drunken man when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it, so as to bind himself to a performance of it.' It will be seen from this case that the contract of a lunatic or drunken person is voidable at his option and not completely void. Therefore if property is transferred as the result of such a contract and subsequently passes to a *bona fide* purchaser for value, it seems that the innocent purchaser would acquire a good title.

The rules of equity are in accordance with those of the common law in this respect. Under such circumstances as we have described, the Courts will decree specific performance against a lunatic or a person who entered into a contract when intoxicated, and will on similar grounds refuse to set aside their contracts.

Section 2 of the Sale of Goods Act, 1893,² which has already been quoted in respect of infants' contracts for necessities, provides that 'where necessities are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor'. The cases indicate that this liability arises *quasi ex contractu*³ and that an executory contract for necessities would therefore be unenforceable.

Sale of
Goods Act,
s. 2

NOTE ON THE CONTRACTUAL CAPACITY OF MARRIED WOMEN

UNTIL 1 January 1883,⁴ the contract of a married woman was, as a general rule, void. At common law, husband and wife were one person, and, as it was cynically said, the husband was that person. Upon marriage, almost the whole of the wife's property vested automatically in her husband. She could not contract with him or with any other person because she had no property with which to contract. In equity, however, property, real and personal, might be settled in trust for the separate use of a married woman independent of her husband, and she could bind this separate property by means of a contractual obligation. But any liability under a contract attached only to the property, and not to the married woman personally. She could not, for example, be committed to prison on a judgment summons for failure to pay a debt. It was payable only out of her separate estate.

¹ At p. 134.

² 56 & 57 Vict., c. 71.

³ *Re Rhodes* (1890), 44 Ch. D. 94. See also Winfield (1942), 58 L.Q.R. 82, at p. 87.

⁴ Married Women's Property Act, 1882 (45 & 46 Vict., c. 75).

Successive statutes from 1870 to 1949 have progressively assimilated the contractual and the proprietary capacity of a married woman to that of a single woman;¹ she may now be sued on her contracts, and judgments may be enforced against her personally in all respects as if she were single. She is under no contractual disability whatever.

¹ The chief statutes have been the Married Women's Property Acts of 1870 (33 & 34 Vict., c. 93), of 1874 (37 & 38 Vict., c. 50), of 1882 (45 & 46 Vict., c. 75), of 1893 (56 & 57 Vict., c. 63), and of 1907 (7 Edw. VII, c. 18); also the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. V, c. 30), and the Married Women (Restraint upon Anticipation) Act, 1949 (12, 13, & 14 Geo. VI, c. 78).

CHAPTER VI

MISREPRESENTATION

IN dealing with Misrepresentation as a circumstance invalidating a contract, we must note, by way of introduction, that a man may, during the preliminary bargaining, make statements of fact which are afterwards embodied in the contract itself, in the form of an undertaking or warranty that certain things *are*, just as he may promise that certain things *shall be*. In either case, the undertaking or promise is a term of the contract. On the other hand, he may make, during the preliminary bargaining, statements of fact, intended by neither party to be terms of the subsequent contract, but which, nevertheless, may seriously affect the inclination of one party to enter into it. Such statements are known as 'representations', or 'mere representations'. If they prove false, the law will, in certain circumstances, grant relief. But the nature of this relief will vary according to whether the misrepresentation was innocent or fraudulent.

Statements which are terms in a contract

and statements which are not

Innocent Misrepresentation

An innocent misrepresentation is a false statement which the person making it honestly believes to be true or which, at any rate, he does not know to be false.

Innocent misrepresentation

Before the passing of the Judicature Act, common law and equity took different views as to the effect of an innocent misrepresentation on the validity of a contract. This divergence has still considerable relevance in relation to the remedies available in the modern law, and it will therefore be necessary to consider the position both before and after the passing of the Act.

(a) Common law

At common law, an innocent misrepresentation (save in certain excepted cases) had no effect on a contract unless it had become a term in the contract itself. If the representation had become a term in the contract, it might be regarded as a vital term going to the root of the contract (a condition), and in this case its untruth entitled the party to repudiate the whole contract;¹ or it might be a term in the nature only of an indepen-

Common law

Condition

¹ Viz. *supra*, p. 110.

Warranty dent subsidiary promise not going to the root of it (a warranty), in which case its untruth did not entitle the injured party to repudiate the whole contract, but gave him a right of action for damages.¹ But where the statement merely induced, and did not form part of the contract itself, in the sense that the party making it did not undertake to make it good, then the common law did not provide any remedy if the statement turned out to be untrue.²

The failure of the common law thus to recognize innocent misrepresentation meant that the party injured had either to establish that the statement made to him was a term of the contract or fail completely. In *Behn v. Burness* in 1863, Williams J. explained the common law rules on the subject of conditions, warranties, and innocent misrepresentations:³

⦿ Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in a written instrument, it is not an integral part of the contract; and, consequently the contract is not broken though the representation proves to be untrue; nor, (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. . . . Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question however may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

Common
law treat-
ment of
representa-
tion
anterior to
contract

The case of *Bannerman v. White*⁴ shows that the Courts of Common Law tended, if possible, to construe as a term of the contract any representation made anterior to the contract which was material enough to affect consent:

¹ Viz. *supra*, p. 112.

³ (1863), 3 B. & S. 751, at p. 753.

² Viz. *supra*, p. 113.

⁴ (1861), 10 C.B., N.S. 844.

Bannerman offered hops for sale to White. White asked if any sulphur had been used in the treatment of that year's growth, as brewers were refusing hops contaminated with sulphur. Bannerman said 'No'. White said that he would not even ask the price if sulphur had been used. They then discussed the price, and White ultimately purchased by sample the growth of that year; the hops were sent to his warehouse, were weighed, and the amount due on the purchase was ascertained.¹ He afterwards repudiated the contract on the ground that the hops contained sulphur. Bannerman sued for their price. It was proved that sulphur had been used over five acres, the entire growth consisting of three hundred acres. Bannerman had used it for the purpose of trying a new machine, and had either forgotten the matter or thought it unimportant.

The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a 'warranty' by the plaintiff. The Court had to consider the effect of this finding, and held that Bannerman's representation had been embodied in and thus become part of the contract—a true condition, the breach of which discharged White from liability to take the hops, even though the jury had described it as a 'warranty'. Erle C.J. said:²

We avoid the term *warranty*, because it is used in two senses, and the term *condition*, because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his *undertaking*, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

Thus we see that, at common law, a preliminary representation might be construed as a contractual undertaking merely in order to give a plaintiff some remedy for the breach of it.

(b) *Equity*

We find no general rule as to the effect of an innocent misrepresentation in equity until 1873, when in a case similar to that of *Bannerman v. White*, relief was granted to the injured

Equitable
relief

¹ The sale was concluded and the property passed, when the hops were weighed and their price ascertained—a common law rule now embodied in the Sale of Goods Act, 1893 (56 & 57 Vict., c. 61), s. 18, Rule 3.

² At p. 860.

party by the application of an equitable principle. This was *Lamare v. Dixon*:¹

Lamare, a merchant in French wines, entered into negotiations with Dixon for the lease of some cellars. He stated that it was essential to his business that the cellars should be dry, and Dixon assured him that they would be so. He therefore made an agreement for a lease, in which there was no term or condition as to the dryness of the cellars. They turned out to be extremely damp. Lamare declined to continue his occupation, and Dixon sued him for specific performance of the contract.

The House of Lords refused to enforce specific performance, not because Dixon's statement as to the dryness of the cellars was a term in the contract, but because it was material in obtaining consent and was untrue in fact.

I quite agree [said Lord Cairns²] that this representation was not a guarantie. It was not introduced into the agreement on the face of it, and the result of that is, that in all probability *Lamare* could not sue in a Court of Law for a breach of any such guarantie or undertaking; and very probably he could not maintain a suit in a Court of Equity to cancel the agreement on the ground of misrepresentation. At the same time, if the representation was made, and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities, that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled.

Refusal of
specific per-
formance

Rescission

Thus we see that before the passing of the Judicature Act, the Court of Chancery would refuse specific performance of a contract induced by innocent misrepresentation. And in transactions of certain kinds it was also prepared to set aside contracts on the same ground. This equitable remedy of *rescission* had not been expressly limited to these transactions, but on the other hand it had not been expressly declared to be applicable to all types of contract. But although equity might refuse specific performance, or grant rescission of the contract, it would not award damages, for damages were a legal remedy and they were not available in the Court of Chancery.³

(c) *Effect of the Judicature Act, 1873*

Judicature
Act, 1873

The Judicature Act⁴ provided that a plaintiff might assert any equitable claim, and a defendant set up any equitable

¹ (1873), L.R. 6 H.L. 414.

² At p. 428. The word 'guarantie' must be understood in the sense of 'warranty'.

³ The power of giving damages, conferred on the Court of Chancery by the Chancery Amendment Act, 1858 (21 & 22 Vict., c. 27), was rarely used.

⁴ 36 & 37 Vict., c. 66, ss. 24 (1), 24 (2), and 25 (11).

defence, in any Court; and that where the rules of equity or common law were in conflict or at variance, the rules of equity were to prevail.

The effect of this enactment was to make available in every division of the High Court of Justice the varying remedies of equity and the common law. So, at the present day, although an innocent misrepresentation still does not give rise to a claim in damages unless it is a term in the contract, the equitable remedies of rescission and refusal of specific performance can be granted in any division of the High Court. These remedies, however, were subsequently extended, so that a misrepresentation which brings about a contract, even though innocent, became a ground for rescission whatever the description of the contract might be. This extended rule was first applied in the case of *Redgrave v. Hurd*:¹

Growth of
modern
rule

The plaintiff induced the defendant to enter into a contract for the sale of a house and, together with it, his business as a solicitor. He misstated the value of the business, and, when sued for specific performance, the defendant set up a counterclaim to have the contract rescinded and damages given him on the ground of deceit practised by the plaintiff.

The Court of Appeal held that there was no such deceit, or statement false to the plaintiff's knowledge, as would entitle the defendant to damages; but specific performance was refused and the contract rescinded on the ground that the defendant had been induced to enter into it by the innocent misrepresentation of the plaintiff. The law was thus restated by Jessel M.R.:²

As regards the rescission of a contract there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the *Judicature Act*, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time that the representation was made that it was false.

In *Newbigging v. Adam*³ the rule thus laid down was adopted by the House of Lords as of general application. This was a case of an innocent misrepresentation which had preceded the execution of a partnership deed. In the Court of Appeal it was said that 'there was a substantial misstatement, though not

¹ (1881), 20 Ch. D. 1.

² At p. 12.

³ (1886), 34 Ch. D. 582, affirmed *sub nom. Adam v. Newbigging* (1888), 13 App. Cas. 308.

made fraudulently, which induced the plaintiff to enter into the contract',¹ and the deed was set aside.

Nature of relief at present day The general principle was therefore established that an innocent misrepresentation, if it furnishes a material inducement, is a ground for resisting an action for breach of contract or for specific performance, and also for asking to have it set aside. But it will not be a ground for the award of damages unless it forms a term of the contract.

Indemnity Nevertheless, when a contract is set aside, the plaintiff is, with some exceptions, to be restored to his old position,² and, although this will not mean that he can claim damages, he may sometimes be entitled to an indemnity. The exact principle upon which such an indemnity may be given is not altogether clear, and in *Newbigging v. Adam* where the matter was discussed, the Court of Appeal expressed different views. All the members of the Court were agreed that the right to an indemnity is less extensive than the right to damages. But Fry L.J. was inclined to hold 'that the plaintiff is entitled to an indemnity in respect of all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of the contract'.³ Bowen L.J., on the other hand, considered 'that the obligations must be *created by the contract*'.⁴

The distinction between damages and an indemnity as it works out in practice may be illustrated by the case of *Whittington v. Seale-Hayne*,⁵ where the principle adopted, however, seems to have been that suggested by Bowen L.J.:

The plaintiffs, who were poultry farmers, had been induced to take a lease of premises by the defendant's innocent oral misrepresentation that they were sanitary. In fact, this was not the case, and in consequence of the contamination of the water supply, their manager fell ill and the poultry died. They claimed rescission of the lease, and an indemnity to cover the value of the stock, loss of profit on sales, loss of breeding season, medical expenses of the manager, rates, rent, and money spent on out-buildings etc. They had also been compelled by the local council to renew the drains, and this item, too, was included.

¹ (1886), 34 Ch. D. 582, at p. 587. See also *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 347; *Mackenzie v. Royal Bank of Canada*, [1934] A.C. 468, at p. 475.

² *Newbigging v. Adam* (1886), 34 Ch. D. 582, *per* Cotton L.J. at p. 588.

³ *Ibid.*, at p. 596, agreeing with Cotton L.J. at p. 589; but it is difficult to see how, in this case, an indemnity would differ at all from damages. *Viz. infra*, p. 460.

⁴ *Ibid.*, at p. 593.

⁵ (1900), 82 L.T. 49.

It was held that they were entitled to have the lease rescinded,¹ and to recover what they had spent on rent, rates, and the renewal of the drains, since these were expenses incurred under the covenants in the lease or arising necessarily out of the occupation of the property, and thus 'obligations created by the contract'. But they could not establish a claim for payment in respect of the other items of loss, since these were damages pure and simple.

The Judicature Act did not, of course, affect the common law rules regarding an innocent misrepresentation which has become a term of the contract, and so the overall position is at present as follows:

- (i) If the statement forms a condition of the contract, the injured party is entitled either to repudiate the contract, or to affirm it and sue for damages *ex post facto*;²
- (ii) If the statement is a warranty, he is entitled to claim damages for breach of the warranty;
- (iii) If the statement is a 'mere' representation, and does not form part of the contract, it affords a ground for resisting an action for breach or for specific performance, and also for rescission of the contract; but no damages, only an indemnity, can be claimed for the pecuniary loss suffered.

Since, however, these remedies are now available in any Court, there is no longer the same inducement to treat as a term of the contract a representation made prior to it in the absence of clear evidence that this was the intention of the parties. In *Heilbut, Symons & Co. v. Buckleton*:³

The plaintiff telephoned the defendants' agent and said 'I understand you are bringing out a rubber company'. The reply was 'We are'. The plaintiff asked for a prospectus, and was told there were none available. He then asked 'if it was all right', and the agent replied 'We are bringing it out'. On the faith of this, the plaintiff bought shares which turned out to be of little value. The company was not accurately described as 'a rubber company', although this assurance had not been given in bad faith. The plaintiff claimed damages.

The House of Lords held that damages could not be recovered. There had been merely an innocent misrepresentation and no

¹ The problem of rescission after the execution of the lease (*infra*, p. 227) does not seem to have been considered by Farwell J.

² For the meaning of *ex post facto*, viz. *supra*, p. 114.

³ [1913] A.C. 30. See also *Oscar Chess, Ltd. v. Williams*, [1957] 1 W.L.R. 370; *supra*, p. 113.

warranty. There was no intention on the part of either or both of the parties that there should be contractual liability in respect of the accuracy of the statement.

Innocent Misrepresentation distinguished from Fraud

Distinction still important Though a contract may now be set aside on the ground of misrepresentation, whether innocent or fraudulent, the distinction between them is still important for several reasons.

In the first place, damages are recoverable where the representation is fraudulent; if it is innocent only an indemnity can be awarded.¹ Secondly, a contract induced by a fraudulent misrepresentation can generally be rescinded even though it has been executed; this is not necessarily so where the representation is innocent.² Thirdly, fraud must be specially pleaded, and a person who pleads, but fails to establish, fraud in the other party, is likely to be penalized in costs.³

What constitutes fraud? We have therefore to ask what constitutes fraud, and here too common law and equity take different views.

(a) Common law

Deceit at common law The leading case is that of *Derry v. Peek*:⁴

A company obtained by means of a private Act of Parliament the right to run trams by animal power or, if the consent of the Board of Trade was obtained, by steam. The directors believed that the Board would give this consent as a matter of course, as they had already submitted plans to the Board without any objection being made. They therefore issued a prospectus saying that the company had the right to run trams by steam-power. The respondent took up shares in the company on the faith of the representation. The Board of Trade ultimately refused their consent, and the company was wound up.

The respondent sued in tort for deceit, and to succeed in such an action he had to prove fraud. For fraud, besides being a vitiating element in contract, is also, at common law, a tort in itself; whereas innocent misrepresentation, though it may vitiate a contract in equity, is not a tort.⁵ His action failed. The law was thus stated by Lord Herschell:⁶

¹ *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30, *per* Lord Moulton at p. 51; *supra*, p. 206.

² *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326; *infra*, p. 227.

³ *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685, at p. 697.

⁴ (1889), 14 App. Cas. 337.

⁵ Even if negligent: *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164.

⁶ At p. 374.

First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.

Lord Herschell went on to point out that making a false statement through want of care falls far short of fraud; so too does a false representation honestly believed, though on insufficient grounds. But he also pointed out that when a false statement has been made, the question whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are weighty matters for consideration, for the ground upon which an alleged belief is founded is an important test of its reality. In the present case, however, the respondent had not shown any absence of an honest belief on the part of any director, and there were obviously present reasons which had led them to make an untrue statement.

Derry v. Peek, therefore, establishes that an innocent misrepresentation will not amount to fraud, at common law, even though negligently made.¹ On the other hand, it also shows that it is not necessary, to constitute such fraud, that there should be a clear knowledge that the statement made is false. What is essential is the absence of any belief in its truth. For it may well happen in the course of business that a man is tempted to assert for his own ends that which he wishes to be true, which he does not know to be false, but which he strongly suspects to have no foundation in fact. If he asserts such a thing with a confident assurance of belief, or if he neglects accessible means of information, his statement is not made in an honest belief in its truth; he may have taken care not to acquaint himself with inconvenient facts.

The motive of the defendant is irrelevant; it is no justification to show that there was no intention to defraud, provided that an intention to mislead was present. Thus in *Polhill v. Walter*:²

The defendant accepted a bill of exchange drawn on another person: he represented himself to have authority to accept the bill, knowing that

¹ *Angus v. Clifford*, [1891] 2 Ch. 449, at p. 463.

² (1832), 3 B. & Ad. 114; *infra*, p. 529.

in fact he had no such authority, but honestly believing that the acceptance would be sanctioned and the bill paid by the person for whom he professed to act. The bill was dishonoured at maturity, and an indorsee, who had given value for the bill on the strength of the defendant's representation, brought against him an action for deceit.

The defendant was held liable. It will be observed that in this case the representation was known to be false; it is thus clearly distinguishable from *Derry v. Peek* where the representation, though in fact false, was honestly believed to be true.

False impression We may note further that it is possible by stating a thing partially to make a statement which, in the sense that it must be known that it will be understood, is really false.¹ It is fraud intentionally to give a false impression and induce a person to act upon it, even though each fact stated taken by itself, may be literally true.² There is, as it has been said,³ 'liability for a *suppressio veri*, which, if it did not amount to an *allegatio falsi*, at least amounted to a *suggestio falsi*'. Also, where a statement is accurate when made, but, before it is acted upon, it becomes false to the knowledge of the party making it, it is deceit if the change of circumstances is not disclosed;⁴ similarly, a statement which is believed to be true when made and which is subsequently discovered to be false, will be considered to be fraudulent if the mistake is not communicated to the other person before he acts on it.⁵

Remedies The remedies for fraudulent misrepresentation are several. Besides the remedy of rescission, which will be discussed later,⁶ the injured party may bring an action for damages for deceit. If the contract has not yet been executed, he may repudiate it, and recover any money paid in an action for money had and received. If he is sued, he may set up the fraud as a defence to an action against him for specific performance or damages, and counterclaim for damages on his own account. But the contract is voidable, and not void, so that these remedies are not available against a third party who takes in good faith and for value.

¹ *R. v. Kylsant (Lord)*, [1932] 1 K.B. 442.

² *Jewson & Sons, Ltd. v. Arcos, Ltd.* (1933), 39 Com. Cas. 59.

³ *Peek v. Gurney* (1873), L.R. 6 H.L. 377, *per* Lord Colonsay at p. 400.

⁴ *With v. O'Flanagan*, [1936] 1 Ch. 575.

⁵ *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, *per* Fry J at p. 475; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, *per* Lord Blackburn at p. 950.

⁶ *Infra*, p. 224.

(b) *Equity*

In equity the term 'fraud' had a more extended meaning than at common law. This is not to say that equity did not recognize the type of fraud defined in *Derry v. Peek*; but it went further and took account of any 'breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience'.¹ Fraud in equity, or 'constructive fraud' as it is usually called, covered a variety of situations: undue influence,² unconscionable bargains,³ abuse of confidence,⁴ and transactions which are contrary to the public interest, such as marriage-brokerage contracts,⁵ contracts in restraint of trade,⁶ and concealed preferences to creditors.⁷ Equitable fraud would entitle the party injured to rescind a transaction tainted with it, and to be restored to his original position.

Fraud in equity

or 'constructive fraud'

When considered in relation to misrepresentation, the doctrine of constructive fraud is material in cases where some fiduciary or other special relationship exists between the parties. It is the duty of the party in whom confidence is reposed to see that this confidence is not abused, and to use due care and skill in the conduct of affairs. So, if he makes to the party confiding a representation which later proves to be false, he will be guilty of constructive fraud where the representation was made in breach of that special duty of care. It is not necessary that he should have known the representation to be false, or even that he should have been recklessly indifferent as to its truth or falsehood; such a test is the test of common law deceit. In equity, if he procures some profit for himself out of the transaction, or fails to disclose his interest, or is negligent in making the representation, if, in fact, he fails to act *bona fide* and with due care, relief will be granted to the injured party.

Fiduciary relationship required

Examples of this fiduciary relationship are those of solicitor and client, father and child, principal and agent, and trustee and beneficiary. So in *Nocton v. Lord Ashburton*:⁸

A solicitor advised his client to release part of a mortgage. The client took his advice, so that the security became insufficient and he suffered loss. The client brought an action against the solicitor, claiming that the

¹ *Nocton v. Lord Ashburton*, [1914] A.C. 932, *per* Viscount Haldane L.C. at p. 954.

² *Viz. infra*, p. 236.

³ *Viz. infra*, p. 299.

⁴ *Viz. infra*, p. 290.

⁵ *Viz. infra*, p. 232.

⁶ *Viz. infra*, p. 234.

⁷ *Viz. infra*, p. 301.

⁸ [1914] A.C. 932.

advice given was fraudulent and improper, and that he was entitled to be compensated for his loss.

Neville J. found that there had been no fraud sufficient to found an action for deceit, and that it was not permissible to turn an action for deceit into one of negligence. But the House of Lords held that the plaintiff might still claim relief in equity for constructive fraud, and, since the advice had been given without sufficient skill and care, he was to be indemnified for the loss he had suffered.

It must be noted again, however, that damages cannot be awarded for constructive fraud. The remedy is that of rescission, together with compensation.

Contracts 'uberrimae fidei'

Contracts
where a
duty to
disclose

Silence does not normally amount to a misrepresentation, except where it distorts a positive statement and makes it false.¹ But there are some contracts in which more is required than the absence of innocent misrepresentation or fraud. In this limited class of contracts one of the parties is presumed to have means of knowledge which are not accessible to the other, and is therefore bound to tell him everything which may be supposed likely to affect his judgment.

Contracts of marine, fire, and life insurance, and indeed contracts of insurance of every kind are of this special class. They are known as contracts *uberrimae fidei*, and may be avoided on the ground of non-disclosure of material facts, even though *restitutio in integrum* is no longer possible.

There are also other contracts, for the sale of land, for family settlements, and for the allotment of shares in companies, which, though not contracts *uberrimae fidei* in the same sense, yet present certain points of resemblance to them and may be properly mentioned here. Among them are sometimes included contracts of suretyship and partnership, but this is disputed.

(a) *Contracts of insurance*

Insurance
contracts

The general principles of law applicable to contracts *uberrimae fidei* do not differ in essence from those applicable to other kinds of contracts, and the rule with regard to the disclosure of material facts and the penalty for non-disclosure is rather a rule of construction for a particular group of contracts.

¹ *Peek v. Gurney* (1873), L.R. 6 H.L. 377, at pp. 390, 403.

'The rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition, contained in the contract itself, precedent to the liability of the underwriter to pay.'¹ The insurer contracts on the basis that all material facts have been communicated to him; and it is an implied condition of the contract that the disclosure shall be made, and that if there has been non-disclosure he shall be entitled to avoid.²

So far as regards marine insurance, the common law rules are now codified in the Marine Insurance Act, 1906.³ Section 18 of the Act provides that:

(1) The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

So if the assured insures goods upon a voyage for an amount largely in excess of their value,⁴ or fails to inform the insurer that they will be carried on deck, where it is unusual for such goods to be carried,⁵ he will be liable even though the non-disclosure was made without any fraudulent intention.

It will be observed that under the Act the assured is, for purposes of communication, 'deemed to know' all circumstances which in the ordinary course of business he ought to know and the same rule applies to an agent effecting an insurance for his principal. The agent must disclose everything material that he himself knows or is deemed to know, as well as everything that his principal is bound to disclose, unless it comes to the knowledge of the principal too late for him to inform the agent.⁶ Every circumstance is material 'which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act'.⁷

¹ *Pickersgill v. London and Provincial Marine Insurance Co.*, [1912] 3 K.B. 614, per Hamilton J. at p. 621.

² *Blackburn v. Vigors* (1886), 12 App. Cas. 531, at pp. 537, 541.

³ 6 Edw. VII, c. 41.

⁴ *Ionides v. Pender* (1874), L.R. 9 Q.B. 531.

⁵ *Hood v. West End Motor Car Packing Co.*, [1917] 2 K.B. 38.

⁶ *Proudfoot v. Montefiore* (1867), L.R. 2 Q.B. 511.

⁷ *Ionides v. Pender* (1874), L.R. 9 Q.B. 531, at p. 539.

Fire insurance A policy of fire insurance will similarly be vitiated by the non-disclosure, however innocent, of any material facts. In an American case,¹ the fact that the insured had been so unlucky as to have had several fires, in each of which he was heavily insured, was regarded by the Court as a material fact, the concealment of which whether intentional or not, vitiated the insurance; and the Court of Appeal has even held that, in a proposal for fire insurance, non-disclosure of the refusal of another insurance company to insure the proposer's motor-car may amount to a non-disclosure of a material fact entitling the insurer to repudiate the contract.²

Life insurance As regards life insurance, the proposer must disclose all material facts within his knowledge with reference to the life assured. In practice, however, insurance companies normally require him not only to do this, but also to warrant the accuracy of any statements made. Thus if he declares that he is not suffering from a particular disease when, in fact, this is, unknown to him, untrue, the insurance company will nevertheless be able to avoid liability on the ground that there was a breach of warranty by the assured. But even apart from this, the test of material facts is a wide one. There is no fundamental distinction between the degree of good faith which is required in different classes of insurance. In *London Assurance v. Mansel*, Jessel M.R. said:³

I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and, though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.

(b) *Contracts for the sale of land*

Sale of land Contracts of this kind are not *uberrimae fidei* in the sense that a vendor has a duty to disclose to the purchaser every material fact relating to the land which is within his knowledge. In the absence of misrepresentation, innocent or otherwise, *caveat emptor* is the rule; but this is subject to certain qualifica-

¹ *New York Bowery Insurance Co. v. New York Fire Insurance Co.* (1837), 17 Wend. 359, cited by Blackburn J. in *Ionides v. Pender* (1874), L.R. 9 Q.B. 531, at p. 537.

² *Löcker & Woolf v. West Australian Insurance Co.*, [1936] 1 K.B. 408.

³ (1879), 11 Ch. D. 363, at p. 367.

tions. A vendor must disclose every material defect in his title, for if he does not make it a condition of the contract that the purchaser should accept a defective title, and the title is in fact defective, he will be unable to perform his contract.¹ The defect must, however, be a serious one, equivalent, in fact, to a substantial misdescription, which would entitle the purchaser legitimately to complain that he had not got what he contracted to buy.

Thus in *Flight v. Booth*:²

The plaintiff agreed to purchase from the defendant the lease of certain premises in Covent Garden. The particulars of sale contained a statement that, under the original lease, 'no offensive trade is to be carried on; they cannot be let to a coffee-house keeper, or a working hatter'. In fact, however, the lease mentioned a large number of trades, including that contemplated by the plaintiff, a fruiterer.

Tindal C.J. held that the plaintiff could rescind the contract and recover back money paid by way of deposit on the purchase of the property:³

We think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale.

Equitable remedies, however, can be adapted to the extent and character of the misdescription; and if this is merely a matter of detail the purchaser may be compelled to conclude the sale subject to compensation to be made by the vendor.⁴

(c) *Contracts preliminary to family settlements*

Contracts for family settlements and arrangements require not only an absence of misrepresentation by the parties entering into them, but also a full disclosure of all material facts within their knowledge. Thus in *Gordon v. Gordon*,⁵ a family arrangement entered into without a secret marriage being disclosed by one side to the other was set aside under this principle.

¹ *Nottingham Patent Brick Co. v. Butler* (1887), 16 Q.B.D. 778, at p. 786.

² (1834), 1 Bing N.C. 370; *Molyneux v. Hawtrey*, [1903] 2 K.B. 487.

³ At p. 377.

⁴ *Shepherd v. Croft*, [1911] 1 Ch. 521.

⁵ (1821), 3 Swan. 400.

*(d) Contracts for the allotment of shares in companies*Purchase
of shares

The rule as to the fullness of statement required of projectors of an undertaking in which they invite the public to join was clearly stated by Kindersley V.-C. in the case of *New Brunswick Railway Co. v. Muggeridge*:¹

Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.

But 'the duty of disclosure is not the same in a prospectus inviting share subscriptions as in the case of a proposal for marine insurance'.² In an honest prospectus, except under statute, the non-disclosure even of facts which some intending shareholders might regard as material in influencing their judgment, will be no ground for rescission, unless the omission makes what is stated actually misleading.

Some further protection to persons applying for shares is, however, provided by section 43 of the Companies Act, 1948,³ which gives a right to compensation from the directors to persons who have sustained loss by subscribing for shares on the faith of an untrue statement in the prospectus of a company, unless the directors can show that they had reasonable ground to believe the statement and continued to believe it until the shares were allotted, or that the statement was a fair account of the report of an expert or a correct representation of an official document. Also, the Act sets out certain matters which the prospectus must contain,⁴ and thus requires a full disclosure of these material facts.

*(e) Suretyship and partnership*Suretyship
and part-
nership

Suretyship and partnership are sometimes described as contracts which need a full disclosure of all facts likely to affect the judgment of the intending surety or partner.

¹ (1860), 1 Dr. & Sm. 363, at p. 381, approved in *Central Railway Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, at p. 113.

² *Aaron's Reef, Ltd. v. Twiss*, [1896] A.C. 273, at p. 287.

³ 11 & 12 Geo. VI, c. 38, re-enacting the provisions of the Directors' Liability Act, 1890 (53 & 54 Vict., c. 64). ⁴ S. 38: Schedule IV, Part I.

This statement goes too far; either contract would be invalidated by material, though innocent, misrepresentation, or by such non-disclosure of a fact as would amount to an implied representation that the fact did not exist; but neither as a rule requires the same fullness of disclosure as is necessary in a contract *uberrimae fidei*. On the other hand it is not always easy in practice to draw the line between contracts of suretyship or guarantee in the strict sense of contracts to answer for the debt, default, or miscarriage of another and contracts of insurance taking the form of contracts to indemnify against some risk stated in the contract.¹ It was pointed out by Romer L.J., in *Seaton v. Heath*² that many contracts may with equal propriety be called contracts of insurance or contracts of guarantee, and that whether a contract requires *uberrima fides* or not depends not upon what it is called, but upon its substantial character and how it came to be effected. Generally in a contract of insurance the person desiring to be insured has means of knowledge of the risk which the insurer does not possess, and he puts the risk before the insurer as a business transaction. In a contract of guarantee, on the other hand, the creditor does not as a rule go to the surety, explain the risk, and ask him to undertake it. The surety is often a friend of the debtor and knows the risk to be undertaken, or the circumstances indicate that as between the creditor and the surety it is contemplated that the surety will take upon himself to ascertain what the risk is. Only in the exceptional cases when a contract of guarantee or suretyship has the characteristics which occur normally in a contract of insurance is the former a contract *uberrimae fidei*.

Accordingly it is settled that there is no duty of full disclosure where a surety guarantees to a bank the account of one of the bank's customers.³ On the other hand, when an employer, in taking a bond from a surety for the fidelity of a servant, did not disclose the fact, known to him but not to the surety, that the servant had previously been guilty of misappropriating money while in his service, he was unable to enforce the bond when the servant subsequently committed a further misappropriation.⁴

¹ *Trade Indemnity Co., Ltd. v. Workington Harbour and Dock Board*, [1937] A.C. 1.

² [1899] 1 Q.B. 782, at p. 792.

³ *National Provincial Bank v. Glanusk*, [1913] 3 K.B. 335; *Cooper v. National Provincial Bank*, [1946] K.B. 1.

⁴ *London General Omnibus Co. v. Holloway*, [1912] 2 K.B. 72.

Further, in the exceptional cases in which a contract of suretyship is a contract *uberrimae fidei*, the surety is entitled to be informed of any subsequent agreement which alters the relation between creditor and debtor or any circumstance which would give him a right to withdraw his guarantee. So in *Phillips v. Foxall*:¹

The defendant guaranteed the honesty of a servant in the employ of the plaintiff; the servant was guilty of dishonesty in the course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dishonesty. The plaintiff required the defendant to make good the loss.

It was held that the defendant was not liable. The concealment released the surety from liability for the subsequent loss; for it would seem that, if the surety learnt that the servant had committed acts of dishonesty which would have justified his dismissal, he would have been entitled to withdraw his guarantee.²

Partnership There seems to be no rule requiring full disclosure in the formation of a contract of partnership, but since, when the partnership has been formed, the parties stand to one another in the confidential relation of principal and agent, each partner is bound to disclose to the others all material facts, and to exercise the utmost good faith in all that relates to their common business. The duties of partners are, however, for the most part, regulated by the provisions of the Partnership Act, 1890.³

Contracts of service Finally we may note the refusal of the House of Lords in *Bell v. Lever Brothers, Ltd.*⁴ to extend the duty of disclosing material facts. In that case, the plaintiffs, Lever Brothers, had entered into an agreement with two of their employees whereby they promised to pay, and did in fact pay, considerable sums to them in compensation for the premature termination of their contracts of service. This contract, however, was strictly unnecessary, for during their employment the two men had been guilty of certain breaches of duty which would have entitled Lever Brothers to dismiss them immediately.¹ When Lever Brothers discovered this fact, they claimed to avoid the contract and recover the money paid on the ground, *inter alia*, that the employees were bound to disclose to them these

¹ (1872) L.R. 7 Q.B. 666.

² *Burgess v. Eve* (1872), L.R. 13 Eq. 450.

³ 53 & 54 Vict., c. 39. ⁴ [1932] A.C. 161; *infra*, p. 242.

breaches of duty. No member of the House of Lords was prepared to accept this contention,¹ and Lord Atkin said:²

I see nothing to differentiate this agreement from the ordinary contract of service; and I am aware of no authority which places contracts of service within the limited category I have mentioned [of contracts *uberrimae fidei*]. It seems to me clear that master and man negotiating for an agreement of service are as unfettered as in any other negotiation. Nor can I find anything in the relation of master and servant, when established, that places agreements between them within the protected category.

Conditions to be Fulfilled before Representation Effective

Unless the misrepresentation is such as to bring into operation the doctrine of legally operative mistake,³ and so to render the contract void *ab initio*, the effect of a misrepresentation made during the negotiations preceding the making of a contract is merely to induce the party to whom it is made to enter into an agreement which is a valid agreement, though it is one which he would not have made if he had not been misled by the misrepresentation. In such a case the contract is not void, but voidable by the party misled.

Meaning of
operative
representa-
tion

We have seen further that this right of avoidance exists whether the misrepresentation is innocent or fraudulent, and that in a limited class of contracts mere non-disclosure of a material fact has the same effect.

We have now to consider the conditions which such a misrepresentation must fulfil in order to make a contract voidable in this way. It is believed that these conditions apply equally whether the misrepresentation is innocent or fraudulent, but it is right to point out that the cases in which they are laid down are for the most part cases of fraud, and that the reports contain few instances of contracts held to be voidable for innocent misrepresentation. The application of the rules about to be stated to innocent, as well as to fraudulent, misrepresentation is to be deduced from the statements of high authority, such as have already been quoted, rather than from specific decisions of the Courts.

(a) There must be a false representation

Apart from the contracts *uberrimae fidei* 'the failure to disclose a material fact which might influence the mind of a

Need for a
representa-
tion

¹ Although it had been accepted by the Court of Appeal: [1931] 1 K.B. 337.

² At p. 227.

³ *Viz. infra*, p. 240.

prudent contractor does not give the right to avoid the contract. The principle of *caveat emptor* applies outside contracts of sale.¹

In *Keates v. Lord Cadogan*² the plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house which he knew to be required for immediate occupation without disclosing that it was in a ruinous condition. It was held that no such action would lie.³

It is not pretended [said *Jervis C.J.*⁴] that here was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit.

Suppression of material facts may, however, render that which is stated false. So, where a vendor of land told a purchaser that all the farms on the land were fully let, but omitted to inform him that the tenants had given notice to quit,⁵ and where the owner of a ship fraudulently took a vessel from the slipway into the water, so as to conceal its rotten hull,⁶ this conduct was held to amount to a misrepresentation.

(b) *The representation must be one of fact*

A representation of fact and not of opinion In order that injured party should be able to rescind the contract, the representation must be one of fact.

A mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he will; the

¹ *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161, *per Lord Atkin* at p. 227.

² (1851), 10 C.B. 591.

³ The house was leased for a term of years. The law is different where a furnished house is leased for a short period. In such a case immediate occupation is of the essence of the contract. See also the Housing Act, 1936 (26 Geo. V and 1 Edw. VIII, c. 51), s. 2, now re-enacted in the Housing Act, 1957 (5 & 6 Eliz. II, c. 56), s. 6.

⁴ At p. 600.

⁵ *Dimmock v. Hallett* (1866), L.R. 2 Ch. App. 21.

⁶ *Schneider v. Heath* (1813), 3 Camp. 506.

second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.¹ Thus in *Anderson v. Pacific Insurance Co.*:²

In effecting a policy of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was safe and good. The ship was lost there.

The Court held that the insured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the letter was not a representation of fact, but of opinion, which the insurers could act upon or not as they pleased. It should not be imagined, however, that a statement of opinion can never constitute a representation of fact. In one sense it always does so, for it asserts that the opinion is actually held. Also the opinion will usually be based upon facts; so the person making the representation impliedly states that he knows facts which justify his opinion. If it is shown that he never was of that opinion, or was ignorant of the facts which gave rise to it, he may be guilty of a misrepresentation.³

Commendatory expressions, such as men habitually use in order to induce others to enter into a bargain, are not dealt with as serious representations of fact. A certain latitude is allowed a man who wants to gain a purchaser, though it must be admitted that the border line of permissible assertion is not always discernible. At a sale by auction land was stated to be 'very fertile and improvable'; it was in fact partly abandoned as useless. This was held to be 'a mere flourishing description by the auctioneer'⁴. But where in a sale of an hotel the occupier was stated to be 'a most desirable tenant', whereas his rent was much in arrear and he went into liquidation directly after the sale, such a statement was held to entitle the purchaser to rescind the contract.⁵

Again, we must distinguish a representation that a thing is from a promise that a thing shall be.⁶ Neither a statement of intention nor a promise can be regarded as a statement of fact except in so far as a man may misrepresent the state of his own mind. Thus there is a distinction between a promise which the

¹ *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at p. 243.

² (1872), L.R. 7 C.P. 65.

³ *Bisset v. Wilkinson*, [1927] A.C. 177, at p. 182.

⁴ *Dimmock v. Hallett* (1866), L.R. 2 Ch. App. 21.

⁵ *Smith v. Land and House Property Corporation* (1884), 28 Ch. D. 7.

⁶ *Ex parte Burrell* (1876), 1 Ch. D. 537, at p. 552.

promisor intends to perform and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in future. In the second case he misrepresents his existing intention: he not only makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. Such a misrepresentation is one of fact:

The state of a man's mind [said Bowen L.J.¹] is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but, if it can be substantiated, it is as much a fact as anything else.

Thus it has been laid down that if a man buys goods having at the time formed an intention not to pay for them, he makes a fraudulent misrepresentation.²

nor a representation of law

A wilful misrepresentation of law does not give rise to an action of deceit, nor even make a contract voidable as against the person making the statement; but it is not always easy to distinguish between a representation of law and one of fact.³ Many statements of fact contain implicit propositions of law and *vice versa*.⁴ At any rate it seems clear that the distinction drawn in *Cooper v. Phibbs*⁵ between ignorance of general rules of law and ignorance of the existence of a private right would also apply to cases of misrepresentation, so as to entitle the person injured to rescission. It would probably not give rise to an action for damages for deceit, for the common law and equitable rules on this topic are not necessarily co-terminous.⁶

(c) *Intended to be acted upon*

Intended to be acted upon

The representation must be made with the intention that it shall be acted upon by the other party.

In *Peek v. Gurney*:⁷

The promoters of a company were sued by persons who had purchased shares on the faith of false statements contained in a prospectus issued by

¹ *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483.

² *Ex parte Whittaker* (1875), L.R. 10 Ch. 446; *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459.

³ *Sollev v. Butcher*, [1950] 1 K.B. 671. See Winfield (1943), 59 L.Q.R. 327.

⁴ *Territorial and Auxiliary Forces Association of London v. Nichols*, [1949] 1 K.B. 35; *infra*, p. 548.

⁵ (1867), L.R. 2 H.L. 149. *Viz. infra*, p. 271.

⁶ *Ministry of Health v. Simpson*, [1951] A.C. 251, at p. 270; Pollock, *Principles of Contract* (13th ed.), p. 374; Guest (1956), 30 Aust. L.J. 187. Cf. Winfield (1943), 59 L.Q.R. 327.

⁷ (1873), L.R. 6 H.L. 377.

them. The plaintiffs were not those to whom shares had been allotted on the first formation of the company; they had merely purchased shares from such allottees.

The House of Lords held that the prospectus was only addressed to the first applicants for shares; that the intention to deceive could not be supposed to extend to others than these; and that on the allotment 'the prospectus had done its work; it was exhausted'.

The law had been thus stated in an earlier case:¹

Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified—*provided it appear, that such false representation was made with the intent that it should be acted upon* by such third person in the manner that occasions the injury or loss. . . . But to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made.

But if a prospectus is only part of a scheme of fraud maintained by false statements deliberately inserted from time to time in the press, its effect is not held to be exhausted by the allotment of shares, and its falsehoods will afford ground for an action for deceit to others than the allottees; for the whole mass of false statement is intended to induce the public at large to continue to purchase shares and thus keep their value inflated.²

(d) *The representation must induce the contract*

The representation must form a real inducement to the party to whom it is addressed; and whether or not a person who has entered into a contract was induced to do so by a particular representation is in each case a question of fact. Must induce the contract

This does not mean that a person to whom a false representation has been made and who has then entered into a contract must prove positively that he made the contract *propter*, and not merely *post, hoc*. Thus it was said by Lord Blackburn:³

I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.

¹ *Barry v. Croskey* (1861), 2 J. & H. 1, *per* Page Wood V.-C. at p. 23.

² *Andrews v. Mockford*, [1896] 1 Q.B. 372.

³ *Smith v. Chadwick* (1882), 9 App. Cas. 187, at p. 196.

On the other hand a man cannot be said to have been induced to enter a contract by a representation which, though false, did not actually deceive him. In *Horsfall v. Thomas*,¹ for example:

Thomas bought a cannon which had been manufactured for him by Horsfall. The cannon had a defect which made it worthless, and Horsfall had endeavoured to conceal this defect by the insertion of a metal plug into the weak spot in the gun. Thomas never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it, the gun burst.

It was held that, as he was not in fact deceived, the attempted fraud having had no operation upon his mind, he could not successfully set up a plea of fraud. 'If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him.'²

Opportuni-
ties for
inspection

The mere fact that the injured party has had the opportunity of investigating and ascertaining whether the representation is true or false will not necessarily deprive him of his right to allege that he was deceived by it;³ but if he does investigate, and consequently relies not so much upon the misrepresentation as upon the accuracy of his own investigations, his action will fail, as it can no longer be said that it was the reason for his entering the contract.⁴ The representation need not, however, be the sole or decisive inducement, provided that it did, in fact, materially affect his intention to enter into the agreement. Thus where a representee bought shares in a company on the faith of certain fraudulent statements contained in a prospectus, and also in the erroneous belief that he would be entitled to the benefit of a charge on the company's assets, he was nevertheless able to rescind on the ground that he had been materially misled.⁵

Limits of the Right to Rescind

When a person has been induced to enter into a contract by a misrepresentation such as has been described,¹ the effect on the contract is not to make it void but to give the party misled an option, either to avoid it, or, alternatively, to affirm it.

¹ (1862), 1 H. & C. 90; *Arkwright v. Newbold* (1881), 17 Ch. D. 301.

² *Ibid.*, per Bramwell B. at p. 99.

³ *Central Railway Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, per Lord Chelmsford at p. 120. ⁴ *Attwood v. Small* (1838), 3 C. & P. 208.

⁵ *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459.

If the party misled elects to avoid the contract, he may take steps to have it set aside by the Courts; or he may resist an action for specific performance, or for damages, brought against him in respect of the contract. Right of rescission

But this option to affirm or avoid will be lost in certain events, the law having laid down certain limits to the right to rescind. Limits of right to rescind

Firstly, if after becoming aware of the misrepresentation he affirms the contract either by express words or by an act which shows an intention to affirm it, rescission cannot be obtained. (i) Affirmation
So, for example, if a person who has purchased shares on the faith of a misrepresentation subsequently becomes aware of its falsity, but neglects to remove his name from the register of shareholders,¹ or accepts dividends paid to him,² he will not then be permitted to avoid the contract. Mere lapse of time, it is said, does not by itself constitute an affirmation of the contract, but, if pronounced, it will be treated as conclusive evidence of a waiver of the right to rescind.³ In certain circumstances, the passage of time may operate so as to defeat the rights of the injured party, even though he had no knowledge of the untruth of the representation.⁴ Thus in the case of an executed contract for the sale of goods induced by an innocent misrepresentation, the possibility of rescission cannot be admitted after a reasonable time, for such contracts cannot be kept open indefinitely.⁵

Secondly, since the contract is voidable and not void, being valid until rescinded, if third parties *bona fide* and for value acquire proprietary or possessory rights in goods obtained under the contract, those rights are valid against the party misled, whether acquired before or after he became aware of his right to rescind.⁶ (ii) Rights of third parties
The standard illustration of this principle is provided by a shareholder who wishes to repudiate his contract to take up shares in a company; he must do so before winding-up, for once the winding-up commences, the rights of creditors become fixed, since they stand in the position of *bona fide* purchasers for value.⁷ Also where goods are obtained

¹ *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, at p. 434.

² *Scholey v. Central Railway Co. of Venezuela* (1867), L.R. 9 Eq. 266n.

³ *Clough v. L. & N.W. Ry. Co.* (1871), L.R. 7 Ex. 26.

⁴ Cf. *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 (acquiescence).

⁵ *Leaf v. International Galleries*, [1950] 2 K.B. 86, at p. 91; *Oscar Chess, Ltd. v. Williams*, [1957] 1 W.L.R. 370; Pollock, *Principles of Contract* (13th ed.), p. 475.

⁶ *Babcock v. Lawson* (1880), 5 Q.B.D. 284.

⁷ *Oakes v. Turquand* (1867), L.R. 2 H.L. 325.

by means of a fraud, a person who subsequently acquires the goods in good faith and for value from the fraudulent purchaser cannot be displaced by the party defrauded.¹

(iii) Ability to restore Thirdly, it has been said that when a party 'exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation to be able to put the parties into their original state before the contract'.² But this limitation should not be too strictly construed, and the mere fact that the subject-matter of the contract may have deteriorated before a fraud is discovered is not sufficient to prevent a *restitutio in integrum* and so to destroy the right to rescind a contract.³ The Courts have refrained from defining the scope of this equitable remedy by any rigid rules:⁴

The general rule is that as a condition of rescission there must be *restitutio in integrum*, but at the same time the Court has full power to make all just allowances. It was said by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.*⁵ that the practice had always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties to the state they were in before the contract.

How this goal of doing 'what is practically just' may be reached depends upon the circumstances of the case; for instance, the Court may think that justice requires the making of some allowance for the deterioration, or the improvement, as the case may be, of the subject-matter of the contract. It will be more drastic in exercising its discretionary powers in a case of fraud than in one of innocent misrepresentation; it will be 'less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff'.⁶

(iv) Executed contracts where representation innocent Finally, there is authority for saying that when the misrepresentation is *innocent* and not fraudulent the right to rescind cannot be exercised after the contract has been executed

¹ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71) s. 23.

² *Clarke v. Dickson* (1858), E. B. & E. 148, per Crompton J. at p. 154; 'You cannot both eat your cake and return your cake', Kinglake Serjt. *arguendo*.

³ *Armstrong v. Jackson*, [1917] 2 K.B. 822, at p. 829; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Alati v. Kruger* (1955), 94 C.L.R. 216 (Australia).

⁴ *Hulton v. Hulton*, [1917] 1 K.B. 813, per Swinfen Eady L.J. at p. 821.

⁵ (1878), 3 App. Cas. 1218, at p. 1278.

⁶ *Spence v. Crawford*, [1939] 3 All E.R. 271, at p. 288.

by the transfer of property under it. In *Wilde v. Gibson*, Lord Campbell said:¹ 'Where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud.' In that case, rescission was refused after the completion of a conveyance of freehold land, and the same principle has also been applied to an executed lease, the lessee having taken possession of the premises under it.² Although some doubts have been expressed in recent years,³ it seems that, where land is concerned, the principle is now too firmly established to be lightly rejected.⁴

More contentious, however, is the extension of this limitation to cases concerning chattels, or choses in action. In *Seddon v. North Eastern Salt Co.*:⁵

*Seddon v.
N.E. Salt
Co.*

The plaintiff entered into negotiations to buy shares in a salt company, it being represented to him that the net trading loss of the company was in the region of £250 per annum. On the faith of this representation he bought the whole of the shares of the company. Later he discovered that the net trading loss was over £900, but he still continued to work the business at a profit for some three months after he became aware of this fact. He then brought an action for rescission of the purchase.

Joyce J. held that, on the assumption that an innocent misrepresentation had been made to him, the plaintiff was not entitled to rescind the contract, as it had been executed by the transfer of the shares. Moreover, by his failure to repudiate as soon as he discovered that the representation was false, he had affirmed transaction, and could not now claim to rescind. It will be noted that the second of these grounds would be sufficient to support the decision, but Joyce J. expressly applied the rule enunciated by Lord Campbell in *Wilde v. Gibson*, even though the subject-matter of the transaction was, in this case, the controlling interest in a company and not land.

This decision does not seem to be entirely satisfactory⁶ for, as McCardie J. has pointed out:⁷

¹ (1848), 1 H.L.C. 605, at p. 633.

² *Angel v. Jay*, [1911] 1 K.B. 666; *Edler v. Auerbach*, [1950] 1 K.B. 359.

³ *Solle v. Butcher*, [1950] 1 K.B. 671, at p. 695. Cf. p. 703 of same case.

⁴ *Shorts v. MacLennan* (1957), 6 D.L.R. (2d) 431 (Canada).

⁵ [1905] 1 Ch. 326.

⁶ See an article by Hammelmann (1939), 55 L.Q.R. 90, which was read to the Court, but without success, in *Leaf v. International Galleries*, [1950] 2 K.B. 86.

⁷ *Armstrong v. Jackson*, [1917] 2 K.B. 822, at p. 825.

It is curious that the doctrine should cease to apply when the formal instrument of transfer has been executed, or the formal delivery of a chattel has taken place. In many cases the misrepresentation cannot, or may not, be discovered until the purchaser has secured his legal title and has therefore entered into possession of his newly acquired property.

It has been held that it does not apply to a contract to take shares in a company, though followed by allotment and the placing of the applicant's name on the company's register;¹ and the Privy Council did not give effect to it in the case of an executed contract of guarantee.² The rule has, in fact, become unpopular of late, and in view of the varying opinions expressed by the Court of Appeal in several cases,³ the question must be regarded as an open one, except where land is concerned.

In one respect, however, the rejection of the rule would have awkward consequences. It will be remembered that, where the sale of goods is concerned, section 11 (1) (c) of the Sale of Goods Act, 1893, provides that the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, either when the buyer has accepted the goods or (if the contract is for specific goods) when the property in them has passed to the buyer.⁴ This means that, normally, where there is a sale of specific goods, the right to reject the goods is lost as soon as the contract is made, for it is then that the property passes to the buyer.⁵ If, therefore, the buyer could rescind the contract on the ground of innocent misrepresentation even after it had been executed by performance, he would, paradoxically, in this respect enjoy a more favourable remedy than the buyer who was seeking to repudiate the contract for breach of condition. Thus, if the representation were contained in the contract, the buyer would have damages without rescission, while if it was not, he would have rescission without damages.

It has consequently been contended that, once the right of repudiation has been lost by the application of section 11 (1) (c) of the Sale of Goods Act, the right to rescind for innocent

¹ *First National Reinsurance Co. v. Greenfield*, [1921] 2 K.B. 260.

² *Mackenzie v. Royal Bank of Canada*, [1934] A.C. 468.

³ *Bell v. Lever Bros.*, [1931] 1 K.B. 557, *per* Scrutton L.J. at p. 588; *Solle v. Butcher*, [1950] 1 K.B. 671, *per* Jenkins L.J. (in favour) at p. 703, and Denning L.J. (against) at p. 695; *Leaf v. International Galleries*, [1950] 2 K.B. 86, at pp. 90, 91, and 95. See also *Long v. Lloyd*, [1958] 1 W.L.R. 753.

⁴ *Viz. supra*, p. 115.

⁵ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71) s. 18: Rule 1.

misrepresentation is also lost—*a fortiori* as it were.¹ This view has the merit of simplicity, but, of course, it leaves the representee without any remedy whatever, as damages cannot be awarded for a mere innocent representation which does not form a term of the contract.

It should finally be noted that rescission is not precluded by execution where the representation, even though innocent, is made in the course of a fiduciary relationship, or comes within the category of constructive fraud.²

¹ *Leaf v. International Galleries*, [1950] 2 K.B. 86 (acceptance); *Frederick E. Rose (London), Ltd. v. William H. Pim, Jr. & Co., Ltd.*, [1953] 2 Q.B. 450, at p. 461; *Long v. Lloyd*, [1958] 1 W.L.R. 753 (affirmation).

² *Armstrong v. Jackson*, [1917] 2 K.B. 822.

CHAPTER VII

DURESS AND UNDUE INFLUENCE

I. DURESS

Duress **A** CONTRACT which has been obtained by means of pressure or intimidation is voidable at common law or in equity on the ground of duress. At common law, the definition of duress is a narrow one, and only the more extreme forms of coercion will suffice. In equity, however, owing to the development of the doctrine of constructive fraud, a contract may be rescinded in cases where common law provides no remedy. Since the Judicature Act, 1873, the distinction has become practically unimportant, for it is the duty of the Courts to apply the wider equitable principles in every case; but for the purposes of instruction it is still illuminating, and we shall accordingly deal with each separately.

(a) *Common law*

At common law At common law, duress consists in actual or threatened violence or imprisonment;¹ the subject of it must be the contracting party himself, or his wife, parent, or child;² and it must be inflicted or threatened by the other party to the contract, or, at least it must be known to him when he entered into the contract.³

Must be personal In order to avoid a contract by reason of duress, the duress must be applied to a man's person, not merely to his goods.⁴ A promise, therefore, which is made in consideration of the release of goods from detention is not voidable for duress. If the detention is obviously wrongful the promise would be void for want of consideration; if the legality of the detention is doubtful, the promise might be supported as a compromise. But money paid for the release of goods from wrongful detention may be recovered back, in an action for money had and received, in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.⁵

¹ Co. Litt. 253b.

² 1 Roll. Abr. 687, pl. 5, 6.

³ *Talbot v. Von Boris*, [1911] 1 K.B. 854.

⁴ *Atlee v. Backhouse* (1838), 3 M. & W. 633.

⁵ *Atley v. Reynolds* (1731), 2 Str. 915; *Maskell v. Horner*, [1915] 3 K.B. 106; *infra*, p. 556.

If the duress consists of a threat of imprisonment, the imprisonment must be unlawful,¹ for threatening to do an action which there is a legal right to do will not ordinarily avoid a contract at common law. Therefore, if manufacturers or wholesale distributors put, or threaten to put, a trader on a stop-list so that he no longer receives supplies, and thereby induce him to pay a certain sum of money, there is no duress at common law. Their action is unlawful by virtue of section 24 of the Restrictive Trade Practices Act, 1956,² but not otherwise, for they are only acting in defence of their legitimate trade interests.³

(b) *Equity*

Equity, on the other hand, will treat contracts as voidable when they have been induced by forms of pressure or coercion which do not amount to duress at common law. The limits of this doctrine are not very clearly defined. Sometimes equitable intervention has been based on the ground that the pressure prevented the party concerned from being a free and voluntary agent; at others on the ground that it is against the general policy of the law to allow a plaintiff to maintain an action on an agreement so unfairly obtained. In equity

At any rate, a threat by one party to prosecute the other for a criminal offence will be a ground for equitable relief, even though it would not be effective at common law. In *Williams v. Bayley*:⁴

A father brought an action for the rescission of a mortgage which he had executed in favour of a banker. His son had given to the banker several promissory notes upon which he had forged his father's signature. The banker made it clear to the father, without actually uttering any threat, that he had it in his power to prosecute the son for forgery, and, to avoid this, the father executed a mortgage in return for the delivery to him of the promissory notes.

It was held that the mortgage should be set aside. Similarly in *Mutual Finance Co., Ltd. v. John Wetton & Sons, Ltd.*:⁵

The defendant company were sued by the plaintiffs on a contract of guarantee. It was shown that the guarantee had been obtained from the defendant company (which was a family undertaking) by a threat to

¹ *Cumming v. Ince* (1847), 11 Q.B. 112; *Biffin v. Bignell* (1862), 7 H. & N. 877.

² 4 & 5 Eliz. II, c. 68.

³ *Thorne v. Motor Trade Association*, [1937] A.C. 797.

⁴ (1866), L.R. 1 H.L. 200; *Kaufman v. Gerson*, [1904] 1 K.B. 591.

⁵ [1937] 2 K.B. 389.

prosecute one of the family for the forgery of a previous guarantee. At the time the coercion was applied, the plaintiffs knew that the father of the alleged forger was in a delicate state of health and that the shock might kill him.

It was held that the guarantee was unenforceable.

II. UNDUE INFLUENCE

Fraud in equity We have already seen that the term 'fraud' was used in a sense wider and less precise in the Court of Chancery than in the common law Courts.¹ This followed naturally from the remedies which they respectively administered. The common law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract or set aside the transaction, with or without compensation, where one party had acted unfairly by the other. Fraud in equity was often used in the sense of unconscientious dealing—'although, I think, unfortunately', to use the words of a great equity lawyer, Lord Haldane.² One form of such dealing is commonly described as 'undue influence'.

Equitable doctrine of undue influence The term 'undue influence' has sometimes been used by the Courts to describe the equitable doctrine of coercion which has just been referred to,³ but it also includes, and it would perhaps be convenient to confine it to, forms of pressure much less direct or substantial than those already discussed. It may arise where the parties stand to one another in such a relation of confidence which puts one of them in a position to exercise over the other an influence which may be perfectly natural and proper in itself, but is capable of being unfairly used.⁴ In dealing with such cases the Courts have been careful not to fetter their jurisdiction by defining the exact limits of its exercise, but there seem to be two situations in which it will be held to be present:⁵

In what it consists First, where the party charged has exercised undue influence in the sense of domination over the other party.

Secondly, where there is an abuse of the duties of care and confidence which may be imposed on one party towards another

¹ *Supra*, p. 211.

² *Nocton v. Lord Ashburton*, [1914] A.C. 932, at p. 953.

³ *Mutual Finance Co., Ltd. v. John Wetton & Sons, Ltd.*, [1937] 2 K.B. 389.

⁴ *Winder* (1939), 3 Mod. L.R. 97.

⁵ *Tufton v. Sperni*, [1952] 2 T.L.R. 516, *per* Evershed M.R. at p. 520.

as a result of the particular relationship which emerges from the special circumstances of their association.

It is often said that, in the former case, evidence of express influence must be adduced by the party seeking to impeach the transaction, whereas, in the latter, undue influence is presumed by the law in the absence of evidence to the contrary.¹ Although this is undoubtedly true, it tends to be rather misleading, as this evidentiary point only serves to mask the important difference of substance which lies between the two categories of case.

Domination by One Party over the Other

If it can be shown that one party exercised such domination over the mind and will of the other that his independence of decision was substantially undermined, the party whose will was overborne will be entitled to relief on the ground of undue influence.

There is no need for any special relationship (of the type mentioned below) to exist between the parties, although, of course, it may do so. The mere fact that domination was exercised is sufficient; no abuse of confidence need be proved. In *Smith v. Kay*,² for example, a young man, only just of age, incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though in no way 'fiduciary', entitled the plaintiff to the protection of the Court.

A case similar in character was that of *Morley v. Loughnan*,³ where an action was brought by executors to recover money paid by the deceased to a man in whose house he had lived for some years, and under whose religious influence he had been. Wright J., in giving judgment for the plaintiffs, said that it was unnecessary to decide whether or not any special relationship existed between the deceased and the defendant, for he 'took possession, so to speak, of the whole life of the deceased, and the gifts were not the result of the deceased's own free will, but the effect of that influence and domination'.⁴

Where the undue influence is of this nature, very cogent evidence is required to be adduced by the defendant to prove

¹ *Allcard v. Skinner* (1887), 36 Ch. D. 145, per Cotton L.J. at p. 171.

² (1859), 7 H.L.C. 750.

³ [1893] 1 Ch. 736.

⁴ At p. 756.

that the decision taken was, in fact, independent of this domination. In *Powell v. Powell*:¹

A settlement was executed by a young woman, under the influence of her stepmother, by which she shared her property with the children of the stepmother's second marriage. She received some independent advice from a solicitor, but he was acting for some of the other parties to the settlement as well as for the plaintiff. It appeared that, although he had expressed disapproval of the transaction, he had not carried his disapproval to the point of withdrawing his services.

It was held that the settlement should be rescinded.

Special Relationship between the Parties

Relation-
ship of
confidence

Even if the plaintiff cannot prove that his mind was 'a mere channel through which the will of the defendant operated',² he may yet succeed if there existed between the parties some special relationship of confidence which the defendant has abused.

Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.³

It is not every fiduciary relationship that raises a presumption of undue influence;⁴ it must be one of a limited class which the Courts regard as suggesting undue influence, and the relations which fall into this category are those between parent (or person in *loco parentis*) and child,⁵ solicitor and client,⁶ medical man and patient,⁷ trustee and cestui que trust,⁸ spiritual adviser and any person to whom he stands in that relationship,⁹ and fiancé and fiancée.¹⁰ Husband and wife is not one of the relations to which the presumption applies.¹¹

¹ [1900] 1 Ch. 243.

² *Tufon v. Sporni*, [1952] 2 T.L.R. 516.

³ *Tate v. Williamson* (1866), L.R. 2 Ch. App. 55, per Lord Chelmsford at p. 61.

⁴ *Re Coomber*, [1911] 1 Ch. 723, at p. 728 (principal and agent will not suffice).

⁵ *Bainbrigge v. Browne* (1881), 18 Ch. D. 188.

⁶ *Wright v. Carter*, [1903] 1 Ch. 27.

⁷ *Mitchell v. Homfray* (1881), 8 Q.B.D. 587.

⁸ *Beningfield v. Baxter* (1886), 12 App. Cas. 167.

⁹ *Huguenin v. Baseley* (1807), 14 Ves. 273; *Allcard v. Skinner* (1887), 36 Ch. D. 145.

¹⁰ *Re Lloyds Bank, Ltd.*, [1931] 1 Ch. 289.

¹¹ *Howes v. Bishop*, [1909] 2 K.B. 390.

The list of such situations is not a closed one, and all the circumstances of the case have to be considered to determine whether such a relationship exists.¹ 'The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed'.² Thus in *Tate v. Williamson*:³

A young man, T., aged twenty-three, was being pressed to pay his college debts, which amounted to some £1,000. Being estranged from his father, he asked his great-uncle to advise him how he should find the means to pay. The great-uncle was unable to advise in person owing to ill health, but he deputed the defendant, his nephew, to do so. Conversations took place between T. and the defendant in which T. expressed the desire to sell part of his estate, upon which the defendant offered to buy it for £7,000. Before the sale was completed, the defendant obtained a report from a surveyor on the property, and this valued it at £20,000. The defendant did not disclose this fact to T., but proceeded with the purchase.

It was held that the transaction must be set aside. The defendant, having been asked to give advice, stood in a confidential relationship to T., and this prevented him from becoming a purchaser of the property without the fullest communication of all material information which he had obtained as to its value.

Similarly, in *Tufton v. Sporni*,⁴ the situation was such that a confidential relationship arose:

The plaintiff and defendant were fellow members of a committee formed to establish a Moslem cultural centre in London, it being understood that the plaintiff would provide the funds for the centre. The defendant induced the plaintiff to buy his (the defendant's) own house for the purpose at a price which grossly exceeded its market value.

The Court of Appeal set the contract aside. The situation was not one which was comprehended by the established categories, nor was there any domination of the plaintiff by the defendant. Yet, as Evershed M.R. pointed out:⁵

If a number of persons join together for the purpose of furthering some charitable or altruistic objective, it would seem not unreasonable to conclude that in regard to all matters related to that objective, each 'necessarily reposes confidence' in the others and each possesses accordingly that 'influence which naturally grows out of confidence'.

¹ *Tufton v. Sporni*, [1952] 2 T.L.R. 516.

² *Smith v. Kay* (1859), 7 H.L.C. 750, *per* Lord Kingsdown at p. 779.

³ (1866), L.R. 2 Ch. App. 55.

⁴ [1952] 2 T.L.R. 516.

⁵ At p. 523.

Rebutting
the pre-
sumption

Where such a relationship does exist, the presumption of undue influence can only be rebutted by proof that the party reposing the confidence has been 'placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control'.¹ The most obvious way of establishing that he was able to do this is to show that he received independent legal advice, and took it. But that is not the only way.² The essential is to show that he acted after the nature and effect of the transaction had been fully explained to him by some independent and qualified person. As was said by Lord Eldon in *Huguenin v. Basdeley*, where a lady made over her property to a clergyman in whom she reposed confidence:³

The question is, not, whether she knew, what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed around her, as against those, who advised her, which, from their situation and relation in respect to her, they were bound to exert on her behalf.

There must, however, be a full appreciation of the facts. In *Tate v. Williamson*, for example, the young man, T., was referred to independent solicitors, but such fair dealing in other respects was, said Lord Chelmsford, 'of no consequence, when once it is established that there was a concealment of a material fact, which the defendant was bound to disclose'.⁴

Unconscionable Bargains

Uncon-
scientious
dealing

There is another class of cases analogous to those of undue influence, but with the element of personal influence wanting, in which equity also throws the burden of justifying the righteousness of a bargain on the party who claims the benefit of it. Lord Selborne describes these cases in *Earl of Aylesford v. Morris*⁵ as cases:

which, according to the language of Lord Hardwicke,⁶ raise, 'from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these

¹ *Archer v. Hudson* (1845), 7 Beav. 551, at p. 560.

² *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127.

³ (1807), 14 Ves. Jun. 273, per Lord Eldon at p. 300.

⁴ (1866), L.R. 2 Ch. App. 55, at p. 65.

⁵ (1873), L.R. 8 Ch. App. 484, at p. 490.

⁶ *Earl of Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125.

circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.

Thus although equity will not normally intervene to protect a contracting party against the consequences of his own folly, some protection is offered to poor and ignorant persons who are overreached in the absence of independent advice.

A particular case of the application of this principle was the protection given by equity to 'expectant heirs', that is, to those persons who have expectations (in the popular sense) of succeeding to property on another's decease.¹ But this is but one illustration, and the principle also applies generally to what have been called 'catching bargains', that is to say, whenever the parties 'meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker'.²

In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of the 'expectant heir', or of persons under pressure without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burden of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.³

Thus in *Fry v. Lane*⁴ it was held that when a purchase had been made from a poor and ignorant man at a considerable undervalue, the vendor having had no independent advice, equity would set aside the transaction.

The intervention of equity in all these cases of coercion, undue influence, and unconscionable bargains, and also in cases of non-disclosure in contracts *uberrimae fidei*,⁵ is grounded upon the same general principle: that it is equity's duty to prevent abuse of confidence and to see that no person retains any benefit arising from his own fraud or wrongful act.

¹ By s. 174 of the Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), a bargain with an expectant heir, made in good faith, and without unfair dealing, is not to be set aside merely on the ground of undervalue. But the jurisdiction of the Court to set aside or modify unconscionable bargains is not affected in other respects.

² *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. App. 484, at p. 491.

³ *O'Rourke v. Bolingbroke* (1877), 2 App. Cas. 814, *per* Lord Hatherley at p. 823.

⁴ (1888), 40 Ch. D. 312.

⁵ *Supra*, p. 212.

Moneylending

Money-
lenders
Acts, 1900
to 1927.

One particular contract which easily lends itself to the kind of oppressive dealing which equity discourages has now been dealt with by statute in the Moneylenders Acts, 1900 to 1927.¹ These Acts do not stigmatize the transaction as *prima facie* unfair or require the moneylender to prove its fairness, but they enable any Court in any proceedings taken by a moneylender for the recovery of money lent, to reopen the transaction if satisfied

that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief.²

A moneylender, according to the definition in the Acts, is a person who carries on the business of moneylending as a business in itself and not as incidental to another business (such as banking);³ and it is sufficient to say that the Court may treat a transaction as harsh and unconscionable not necessarily because there was oppression or advantage taken of one party by the other, but because the rate of interest was excessive,⁴ having regard to all the circumstances of the case, among others to the character and value of the security given for the debt.

Rescission

Rescission

The right to rescind contracts and to revoke gifts made under undue influence is similar to the right of rescinding contracts induced by fraud. Such transactions are voidable, not void. Consequently third parties who acquire some interest in the subject-matter of the contract in good faith and for value cannot be displaced by the person seeking rescission.

Presumed
affirmation

Moreover, the right to rescind may be lost by affirmation, and so soon as the undue influence is withdrawn, the action or inaction of the party influenced becomes liable to the construction that he intended to affirm the transaction. Thus in *Mitchell v. Homfray*⁵ a jury found as a fact that a patient who had made a gift to her physician determined to abide by her gift after the confidential relationship of physician and patient

¹ 63 & 64 Vict., c. 51; 17 & 18 Geo. V, c. 21.

² Act of 1900, s. 1.

³ *Litchfield v. Dreyfus*, [1906] 1 K.B. 584.

⁴ *Samuel v. Newbold*, [1906] A.C. 461; a rate of over 48 per cent. *per annum* is *prima facie* excessive.

⁵ (1881), 8 Q.B.D. 587.

ceased, and the Court of Appeal held that the gift could not be impeached. Also in *Allcard v. Skinner*:¹

The plaintiff was introduced by her spiritual adviser and confessor to the defendant who was the lady superior of a Protestant community called 'The Sisters of the Poor'. The plaintiff subsequently became a professed member of the community and bound herself to observe rules of poverty, chastity, and obedience. The rule of poverty bound her to relinquish all earthly possessions, and the rule of obedience not to seek the advice of anyone outside the community without permission. In 1872 she came into possession of certain stocks, which she transferred to the defendant as superior of the community; she also made a will in the defendant's favour. In 1879, she left the sisterhood. She immediately revoked the will, but took no steps to retrieve the property which she had conveyed to the defendant until some six years had elapsed.

It was held that, by her inactivity after she had been freed from the spiritual influence of the defendant, she had acquiesced in the gift, and her claim was barred by this acquiescence.

But the affirmation is not valid unless there is an entire cessation of the undue influence which had brought about the contract or gift. The necessity for such a complete relief of the will of the injured party from the dominant influence under which it has acted is thus set forth in *Moxon v. Payne*:²

depends on
cessation of
influence

Frauds or impositions of the type practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and *an absolute release from the undue influence by means of which the frauds were practised*.

The same principle is applied where a man parts with a valuable interest under pressure of poverty and without proper advice. Acquiescence is not presumed from delay alone; on the contrary, 'it is presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside'.³

Finally we may note that a transaction into which a person has been induced to enter by the exercise of undue influence may be set aside, not only as against the person exercising that influence, but also as against a party having notice of the fact that the influence was used.⁴

Third
parties
with
notice

¹ (1887), 36 Ch. D. 145.

² (1873), L.R. 8 Ch. App. 881, *per* James L.J. at p. 885.

³ *Fry v. Lane* (1888), 40 Ch. D. 312, at p. 324.

⁴ *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380.

CHAPTER VIII

MISTAKE

Nature
of the
problem of
mistake

IF one, or both, of the parties to a contract enter into it under some misunderstanding or misapprehension, in what circumstances will they be permitted to allege that the contract is defective, on the ground that, if they had known the true facts, they would never have entered into the agreement?

This is the basic question which arises in the topic of Mistake; but it is advisable to state at the outset that it constitutes one of the most difficult topics for the student in the English law of contract.¹ The principles upon which the Courts will intervene, and the circumstances in which they will do so, have never been precisely settled, and the decided cases are open to a number of varying interpretations. The position is further complicated by the fact that there has been a distinct change in the attitude of the judges towards the question of mistake during the last hundred years. During the nineteenth century, in reliance on the *consensus* theory of contract, it was required of the parties that their consent should be 'true, full and free'.² The Courts were therefore more readily disposed (subject to the limitations imposed by practical convenience) to hold that, where there was no genuine and real consent, there was no valid contract. At the present time, however, the Courts are very reluctant to intervene in this manner.

The reasons for this change are twofold. In the first place, at common law, if a contract is entered into under a legally operative mistake, it is void *ab initio*; it has no legal effect whatever. Consequently, if the subject-matter of the contract consists of goods, no property in the goods will pass under the contract. A third party who takes the goods in good faith and for value will nevertheless acquire no title to them, and will

¹ The periodical literature on this subject is voluminous. Some of the leading articles may be given here: Goodhart (1941), 57 L.Q.R. 228; Glanville Williams (1945), 23 Can. Bar Rev. 271; Cheshire (1944), 60 L.Q.R. 175; Tylor (1948), 11 Mod. L.R. 247; Grunfeld (1952), 15 Mod. L.R. 297; Wilson (1954), 17 Mod. L.R. 515; Slade (1954), 70 L.Q.R. 385; Unger (1955), 18 Mod. L.R. 259; Shatwell (1955), 33 Can. Bar Rev. 164; Bamford (1955), 72 S.A.L.J. 166, 282; Smith and Thomas (1957), 20 Mod. L.R. 38; Atiyah (1957), 73 L.Q.R. 340.

² Pollock, *Principles of Contract* (13th ed.), p. 364; *supra*, p. 6.

have to deliver them up to the true owner.¹ Secondly, there is a feeling that, once the parties are ostensibly in agreement in the same terms and upon the same subject-matter, they ought to be held to their bargain; they must rely on the stipulations of the contract for protection from the effect of facts unknown to them.²

Nevertheless, cases will undoubtedly arise in which it would be unjust to hold the parties strictly to their agreement. Such cases will occur quite independently of any express warranty, or misrepresentation, or fraud, and relief must be sought, if at all, on the ground of mistake. To meet this difficulty the Courts have side by side with their refusal to apply the doctrine of common law mistake, developed the use of certain equitable remedies which are, in some ways, more satisfactory as they are discretionary and, further, do not render the contract void *ab initio*. In this subject, therefore, we shall discuss the effect of mistake, first at common law, and then in equity, remembering that the principles here laid down should in no way be regarded as definitive, but rather as an attempt to extract a *rationale* from cases decided on a more empirical basis.

I. MISTAKE AT COMMON LAW

This section is concerned with that form of mistake which Common law invalidates a contract,³ and there are certain topics, superficially connected with the subject which it will be well to eliminate at the outset.

We are not here concerned with cases where the parties are Mistake of expression genuinely agreed, although the terms employed in making their agreement do not convey their true meaning. In such cases they are permitted to explain, or the Courts are willing to correct, their error; but this is a question which concerns the interpretation, and not the formation, of a contract.⁴

Nor are we concerned with cases in which there is not even Want of mutuality the outward semblance of agreement, because offer and acceptance never coincided in their respective terms.⁵

Nor, lastly, are we concerned with cases in which a man Failure of expression finds the obligation of a contract more onerous than he

¹ *Cundy v. Lindsay* (1878), 3 App. Cas. 459; *infra*, p. 260.

² *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161, *per* Lord Atkin at p. 224.

³ 'If mistake operates at all, it operates so as to negative or in some cases to nullify consent', *ibid.*, at p. 217.

⁴ *Infra*, p. 268.

⁵ *Supra*, p. 50.

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intended, or is disappointed in the performance which he receives from the other party. If the terms of a contract do not express what one of the parties intended them to express, his failure to find words appropriate to his meaning is not mistake; it is a question of construction.¹

Cases of
operative
mistake

The cases with which we have to deal fall into two main classes:

- (i) cases in which the parties, though genuinely agreed, have both contracted in the mistaken belief that some fact which lies at the root of the contract is true. This type of mistake is generally known as *mutual* mistake, as it is common to both parties.
- (ii) cases, where, although to all outward appearances the parties are agreed, there is in fact no genuine *consensus* between them, and the law therefore does not regard a contract as having come into existence. This type of mistake is sometimes known as *unilateral* mistake,² as the mistake is on one side only.

It should be noted, however, that for a mistake to be operative at common law, it must be one of fact. A mistake of law will be ineffective.³

Mistake as to the Existence of a Fact at the Root of the Contract

Mutual
mistake

In this type of mistake, the parties, though genuinely *ad idem*, contract on the basis of an assumption which subsequently proves to be false.

Bell v.
Lever Bros.

The leading case is that of *Bell v. Lever Brothers, Ltd.*⁴ The facts of the case are fairly simple, but the judgments are difficult of interpretation, so that it is advisable to discuss the case at some length.

The plaintiffs, Lever Brothers, entered into two agreements with the defendants, Bell and Snelling:

The first agreement was a service contract by which Bell and Snelling were appointed to the Board of the Niger Company, a subsidiary of Lever Brothers, for a period of five years at salaries of £8,000 and £6,000 p.a. respectively.

The second agreement was a compensation contract by which Lever Brothers, in consideration of their retiring within the service period,

¹ *Supra*, p. 138.

² E.g. by Lord Atkin in *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161, at p. 217.

³ *Viz. infra*, p. 545. For the position in equity, *viz. infra*, p. 267 n.

⁴ [1932] A.C. 161.

promised to pay Bell compensation amounting to £30,000 and Snelling compensation amounting to £20,000.

While they were acting under their appointments, both Bell and Snelling had secretly entered on their own account into speculative transactions in cocoa, a course of conduct which would have given Lever Brothers the right to dismiss them summarily and without compensation. It was in ignorance of this fact that Lever Brothers had entered into the compensation contract, and paid the sums therein promised. They now sought to recover this money on the ground that it had been paid under a mistake of fact.

The jury found that the defendants had been guilty of no fraud, whether actual or constructive, and that, at the time they entered into the compensation contract, they did not have in mind their breaches of duty. The case must therefore be considered as one of *mutual* mistake, that is, one where the parties had both contracted under the same mistaken assumption. The plaintiffs would nevertheless have never entered into the contract had they known the true state of affairs, and they therefore alleged that the contract was a nullity from the beginning. The Court of Appeal¹ upheld this contention; but the House of Lords, by a bare majority, reversed the decision of the Court of Appeal and held that the contract was valid and binding.

The case is, of course, a final authority for whatever it decides, but there has been considerable discussion as to what this is. One member of the House, Lord Blanesborough, while stating that he was in accord with the other majority opinions, based his own decision on a point of pleading.² The other two majority members, Lord Atkin and Lord Thankerton, in the course of their speeches, formulated a number of propositions which, although directed to the same end, tend not to be easily reconcilable one with the other. Subsequent commentators, both judicial and academic, have therefore been readily able to find in them sufficient support for their own conflicting interpretations of the doctrine of mutual mistake.³ Some of these interpretations may be considered here.

First, it is said that the case establishes that there is no such doctrine of mistake, rendering the contract void *ab initio*, in ^{(i) no doctrine of mistake}

¹ [1931] 1 K.B. 557.

² He also pointed out that the payments made to the defendants were, at any rate in part, voluntary payments, and so could not be recovered as money paid under a mistake (viz. *infra*, p. 546).

³ Tylor (1948), 11 Mod. L.R. 247; Slade (1954), 70 L.Q.R. 385; Shatwell (1955), 33 Can. Bar Rev. 164.

English law.¹ In *Solle v. Butcher*, for example, Denning L.J. said:²

All previous decisions on this subject must now be read in the light of *Bell v. Lever Brothers*. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely upon his own mistake, to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. *A fortiori*, if the other party did not know of the mistake but shared it.

Some support for this contention can be found in the speech of Lord Atkin,³ but both he and the other members of the House of Lords assume throughout that certain types of mistake will avoid a contract, although they differ as to the circumstances in which it will do so. Nevertheless, it is clear that the effect of the decision in *Bell v. Lever Brothers* is to confine the doctrine of mutual mistake within the most narrow limits; it is only in the most extreme cases that the Court will intervene.

(ii) contract invalid only if term can be implied to that effect Secondly, it is said that the case establishes that a contract is void at law only if some term can be implied in both offer and acceptance which prevents the contract from coming into operation.⁴ Lord Atkin expressly states that this is a proposition to which few would demur,⁵ but cogently goes on to point out that it does not take us very far in the inquiry how to ascertain whether the contract does contain such a term.

The cases examined It is suggested that some guidance may be obtained by an examination, in the light of decided cases, of the examples of mistake put forward in the speeches; these envisage four main types of operative mutual mistake:

- (a) mistake as to the existence of the subject-matter of the contract;
- (b) mistake as to title;
- (c) mistake as to the substance of the thing contracted for;
- (d) a false and fundamental assumption going to the root of the contract.

¹ Slade (1954), 70 L.Q.R. 385.

² [1950] 1 K.B. 671, at p. 691.

³ *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161, at p. 224.

⁴ Slade (1954), 70 L.Q.R. 385.

⁵ At p. 225.

(a) Mistake as to the existence of the subject-matter of the contract

If the subject-matter of the contract has, at the time of the contract, and unknown to the parties, ceased to exist, or if it has never been in existence, then the contract is *prima facie* void.

It has been doubted whether this is properly to be regarded as mistake, or whether we should say rather that the contract is impossible of fulfilment.¹ In *Bell v. Lever Bros.*, Lord Atkin said:²

Mistake
and im-
possibility

So the agreement of A. and B. to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties were in fact agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified.

The same rule is partially codified in section 6 of the Sale of Goods Act, 1893,³ and is further exemplified by the leading case of *Couturier v. Hastie*:⁴

A contract was made for the sale of a cargo of corn, which the parties supposed to be on its voyage from Salonica to England. It had, in fact, before the date of sale, become so heated that it was unloaded at Tunis and sold for what it could fetch. The seller brought an action for the price of the corn, claiming that the purchaser was liable to pay in any event. He argued that, on the true construction of the contract, 'the purchaser had bought the cargo if it existed at the date of the contract, but that, if it had been damaged or lost, he bought the benefit of the insurance but no more'.

The House of Lords held that the purchaser was not liable to pay for the corn. He had contracted to buy that particular cargo and the seller could not therefore fulfil his obligation by handing over the shipping documents, carrying, as these would, the benefit of the insurance. The sale was one of specific goods, and not merely of an adventure. Neither Coleridge J., who

¹ Cheshire and Fifoot, *Law of Contract* (4th ed.), p. 177. This, and mistake as to title (*infra*), have been described by Bamford (1955), 72 S.A.L.J. 166, 282 as examples of 'pre-contractual frustration'. But it is doubtful whether the same principles apply in both cases. For example, it is probable that *Krell v. Henry*, [1903] 2 K.B. 740 (*infra*, p. 430) would not be void if it were a case of mutual mistake. See *Griffiths v. Brymer* (1903), 19 T.L.R. 434.

² At p. 217.

³ 'Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.' See also s. 7 of the same Act (56 & 57 Vict., c. 71).

⁴ (1856), 5 H.L.C. 673; Atiyah (1957), 73 L.Q.R. 340.

delivered the judgment of seven judges in the Exchequer Chamber,¹ nor Lord Chancellor Cranworth in the House of Lords, actually mentioned the word 'mistake', for they considered the case purely as one of the construction of the contract; but they intimated that the contract would be void, inasmuch as 'it plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased', whereas the object of the sale had ceased to exist.²

In *Strickland v. Turner*,³ the plaintiff bought and paid for an annuity on the life of a man who was, unknown to both parties, already dead. He was able to recover the purchase money as the annuity had ceased to exist at the time of sale. Similarly in *Gompertz v. Bartlett*,⁴ the purchaser of an unstamped bill of exchange, which both parties erroneously believed to have been drawn in this country, was entitled to recover the price as the bill was void.

Presump-
tion of
invalidity

In the illustrations so far considered it is not difficult to see that the non-existence of the subject-matter of the contract gives rise to a total failure of consideration. If a cargo does not exist, it cannot be transferred; if an annuity is purchased on the life of a dead man, the purchaser gets nothing for his money. It does not matter whether the contract is valid or void. In neither case can the seller claim to recover, or retain, the purchase money. The consideration for the contract has totally failed. It is only when the buyer brings an action for *damages* for non-delivery that the crucial question of the validity of the contract will arise. So in *McRae v. Commonwealth Disposals Commission*:⁵

The defendants, the Commonwealth Disposals Commission, invited tenders for the purchase of a vessel described as 'an oil tanker on Jourmaund Reef approximately 100 miles north of Samarai' in New Guinea. The plaintiff's tender was accepted, and he thereupon fitted out a salvage expedition at considerable expense. In fact there was no oil tanker in the locality indicated, nor was there even such a reef as Jourmaund Reef. The plaintiff brought an action against the Commission claiming damages in respect of the loss sustained by him in fitting out the expedition.

The Commission, whose conduct was described by the High Court of Australia as 'reckless and irresponsible', resisted the

¹ (1853), 9 Ex. 102, reversing the Court of Exchequer at (1852), 8 Ex. 40.

² (1856), 5 H.L.C. 673, at p. 681.

³ (1852), 7 Ex. 208.

⁴ (1853), 2 E. & B. 849.

⁵ (1951), 84 C.L.R. 377; (1952), 68 L.Q.R. 30; (1952), 15 Mod. L.R. 22 9; (1955), 33 Can. Bar Rev. 164; (1957), 73 L.Q.R. 340.

claim to damages on the ground that the contract was void *ab initio*. They relied on *Couturier v. Hastie* for the proposition that mutual mistake as to the existence of the subject-matter of a contract nullifies consent and avoids the contract. The Court did not, however, accept this argument. They considered that the question of the validity of the contract had never arisen in that case; it was merely concerned with the failure of the consideration. If it had arisen, the decision would have depended upon whether the contract was subject to an implied condition precedent that the cargo existed at the time of the contract. No such condition could, in any event, be implied in the case before the Court, for the Commission had clearly contracted that the tanker did exist in the situation specified, and they must be held liable for breach.

It has been argued that the reasoning of the High Court of Australia in *McRae's Case* effectively negatives the existence of any such rule as that set out above; indeed, it is said that a contract concerning subject-matter which is non-existent is always valid and binding, unless a term can be implied to the contrary.¹ It is submitted, however, that this is not the case. The merit of the decision in *McRae v. Commonwealth Disposals Commission* is that it shows that invalidity is not an invariable consequence of such a contract. The question is one of the construction of the agreement. *Prima facie* the parties must be taken to have contracted on the basis that the subject-matter of their contract was in existence;² this would seem to be only common sense. If, therefore, it was not in existence, the contract is normally void. But if on a true construction of the agreement, it is found that one party warranted the existence of the subject-matter;³ or that the buyer agreed to purchase merely an adventure;⁴ or that he was induced to believe that the subject-matter was in existence by the conduct or the assurance of the other party to the contract acting without due care,⁵ then it will not be considered to be a nullity from the beginning, and appropriate rights of action will arise.

This would seem to be the correct approach to the question of mistake as to the existence of the subject-matter of the contract. It is not inconsistent with authority; and it is in

¹ Slade (1954), 70 L.Q.R. 385. ² Cf. Atiyah (1957), 73 L.Q.R. 340.

³ *McRae v. Commonwealth Disposals Commission* (1951), 84 C.L.R. 377.

⁴ As was argued in *Couturier v. Hastie* (*supra*).

⁵ A form of estoppel. This point was considered in *McRae's Case*, and it was said that it would be effective.

accord with the general experience of mankind that persons do not normally intend to enter into contracts which are incapable of fulfilment.

(b) *Mistake as to title*

Purchase
of a *res sua*

Where a person agrees to purchase property which, unknown to himself and to the seller, is his own already, the contract is void.

In *Bell v. Lever Bros.*, Lord Atkin said:¹

Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is *naturali ratione inutilis*.

So if *A* agrees to take from *B* a lease of land of which, contrary to the belief of both parties at the time of the contract, *A* is already tenant for life, the contract is void at common law.² But this principle must not be applied too widely. Normally a seller is taken to warrant his title to the property sold; even though the parties both contract under a mistaken belief as to the title of the seller, there is a valid contract, and the seller may be made liable in damages. It is only where the buyer chances to purchase his own property that the contract is a nullity from the beginning. For both parties must have accepted in their minds as an essential and integral element of the subject-matter of the transaction that the seller had a right to sell, and that the buyer could purchase, the property.³

(c) *Mistake as to the substance of the thing contracted for*

Quality and
substance

This has proved to be one of the most contentious categories in the law of mutual mistake. In *Bell v. Lever Bros.*, Lord Atkin said:⁴

Mistake as to the quality of the thing contracted for raises more difficult questions. In such a case mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality *essentially different* from the thing as it was believed to be.

¹ [1932] A.C. 161, at p. 218.

² *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149—a case in equity where the contract was rescinded for mistake; but see the view of Lord Atkin at p. 218 and Lord Thankerton at p. 235 of *Bell v. Lever Bros., Ltd.* on its invalidity at common law.

³ [1932] A.C. 161, *per* Lord Thankerton at p. 236.

⁴ *Ibid.*, at p. 218.

In reliance on this statement, it has been suggested that a distinction should be drawn between a mistake as to *substance* (or essence) on the one hand, and a mistake as to *quality* (or attributes) on the other. A mistake of the former type, it is said, will avoid the contract, whereas a mistake of the latter type will not.¹

Some support for this distinction may be gained from the case of *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.*:²

The plaintiff took shares in a further issue of capital by the defendant company, being induced to do so by a statement in the prospectus that the new capital was required to carry out a contract recently entered into with the New Zealand government for the carriage of mails. A contract had been made with an agent of the New Zealand government, and the company genuinely believed it to be valid. But it had been made without authority and the New Zealand government refused to ratify it. As a result, the shares fell greatly in value and the plaintiff claimed to return the shares and recover back the money which he had paid.

The Court of Queen's Bench refused to allow him to do so. They held that the shares which he had received were not, because of the difference in value, different in substance from those which the company had contracted to deliver. Blackburn J., delivering the judgment of the Court, referred to the Digest of Civil Law³ and said:⁴

The answers given by the great jurists quoted are to the effect, that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding.

He thought that the principle of English law was the same as that of Roman law,⁵ and that, at common law, if the mistake was as to quality, there was no remedy in the absence of fraud, or of a definite warranty.

That a mistake as to quality will not generally avoid the contract can scarcely be doubted. We may give some examples, both actual and hypothetical:

Mistake as to quality not usually operative

A buys *B*'s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had

¹ Tylor (1948), 11 Mod. L.R. 247.

² (1867), L.R. 2 Q.B. 580 (a common law case), expressly approved in *Bell v. Lever Bros., Ltd.*, *passim*.

³ Digest, 18.4.9, 10, 11.

⁴ At p. 588.

⁵ Cf. Lawson (1936), 52 L.Q.R. 79.

known, as the fact is, that the horse is unsound. If *B* has made no representation as to soundness and has not contracted that the horse is sound, *A* is bound and cannot recover the price.¹

C agrees to buy from *D* a certain parcel of oats which both believe to be old oats. They are in fact new oats, and unsuitable for the purpose for which *C* wants them. There is a valid contract despite the mistake.²

E buys from *F* a picture which both believe to have been painted by Constable. Several years later, when *E* tries to sell the picture, he finds that it was not painted by Constable at all. The mistake, though 'fundamental', does not avoid the contract.³

G agrees to buy from *H* '100 bales of Calcutta kapok, Sree brand'. The sale is by sample, but both parties believe that this particular brand of kapok is pure kapok, consisting of tree cotton, whereas it in fact contains an admixture of bush cotton and is a commercially inferior product. The contract is valid.⁴

J buys from *K* a car which both believe to be a 1948 model. It is actually a 1939 model, and very much less valuable. There is no mistake at common law.⁵

Mistake as to substance does not necessarily avoid

When, however, we come to consider the effect of a mistake as to substance, we find that this type of mistake does not necessarily avoid the contract. In *Solte v. Butcher*:⁶

After making certain structural alterations to a flat, the defendant let it to the plaintiff for seven years at a rent of £250 per year. Both parties believed at the time of the letting that the alterations had so altered the identity of the flat as to make it a 'new' dwelling house, and so released it from the controlled rent imposed by the Rent Acts. In fact this was not the case, and the plaintiff brought an action against the defendant claiming the rent overpaid, the controlled rent of the flat being £140 per year. The defendant counterclaimed, alleging (*inter alia*) that he was entitled to eject the lessee as the lease had been entered into under a mutual mistake and was void.

The Court of Appeal held that, although there was a mistake as to the identity of the flat, and that this was, in the social context, a mistake on a matter of considerable importance, nevertheless the lease was not void at common law. It would afford grounds for relief in equity, but it was not a nullity from the beginning. Similarly in another case, where the parties contracted to buy and sell 'horsebeans', a substance essentially

¹ *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161, per Lord Atkin at p. 224.

² *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; *infra*, p. 257.

³ *Leaf v. International Galleries*, [1950] 2 K.B. 86; *supra*, p. 116.

⁴ *Harrison & Jones, Ltd. v. Buntin and Lancaster, Ltd.*, [1953] 1 Q.B. 646.

⁵ *Oscar Chess, Ltd. v. Williams*, [1957] 1 W.L.R. 370; *supra*, p. 113.

⁶ [1950] 1 K.B. 671.

different from the 'feveroles' which both believed them to be, the contract was not avoided.¹

It is evident then that there is no clear rule which states that a mistake as to the substance of the thing contracted for will avoid the contract. But there are possibly circumstances in which it will do so:

Suppose that *A* agrees to buy and *B* to sell certain bales which both parties believe to contain hemp; they in fact contain tow.

It is conceived that the contract would be void. The parties contracted in respect of certain bales; they also contracted on the basis that the bales contained hemp. To force *A* to accept these bales, or to require *B* to supply other hemp, would be to compel the parties to perform a contract which neither intended to make.² The mistake is, to use the words of Lord Thankerton in *Bell v. Lever Bros.*³ a mistake as to 'an essential and integral element in the subject-matter of the bargain'.

The distinction between substance and quality is, at the best, an arbitrary one, for there is no metaphysical 'substance' independent of qualities.⁴ It would be better to approach such problems from the point of view of whether the parties contracted under such a fundamental misapprehension as would destroy the identity of the *contract*, rather than to concentrate upon the niceties of a Romanistic substance-quality distinction.

Unsatisfactory nature of substance-quality distinction

(d) *A false and fundamental assumption*

Where the parties contract under a false and fundamental assumption, going to the root of the contract, and which both of them must be taken to have had in mind at the time they entered into it as the basis of their agreement, the contract is void.

Mistaken assumption going to root of contract

This should not be regarded as a category separate and distinct from those categories of mistake already mentioned, but rather as a more compendious statement of the type of error required. It received the approval of both Lord Atkins⁵

¹ *Frederick E. Rose (London), Ltd. v. William H. Pim Junior & Co., Ltd.*, [1953] 2 Q.B. 450; *infra*, p. 269.

² Holmes, *Common Law*, p. 310; *Thornton v. Kempster* (1814), 5 Taunt. 785; *Nicholson and Venn v. Smith Marriott* (1947), 177 L.T. 189.

³ [1932] A.C. 161, at p. 236.

⁴ Glanville Williams (1945), 61 L.Q.R. 293, (1945), 23 Can. Bar Rev. 271. Cf., Tylor (1948), 11 Mod. L.R. 247, who, presumably, is a Platonic idealist.

⁵ [1932] A.C. 161, at p. 225.

and Lord Thankerton¹ in *Bell v. Lever Bros.*, although some doubts were there expressed as to its value owing to the necessary vagueness of its formulation. One thing, however, is certain. It is not sufficient for one party to establish that, had he known the true facts, he would never have entered into the bargain. Indeed, there may be assumptions which may be regarded by one, or both, of the parties as, in one sense, 'fundamental'—for example, that a picture is the work of an old master, or that a flat is free from rent control. Yet the contract will still bind. As Lord Thankerton points out:²

The phrase 'underlying assumption by the parties', as applied to the subject-matter of the contract, may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract; in my opinion it can only properly relate to something which both must have necessarily accepted in their minds as an essential and integral element of the subject-matter.

In *Bell v. Lever Brothers* itself, this requirement was not fulfilled. An agreement to terminate an unbroken contract is not different from an agreement to terminate a broken contract.

The contract released is the identical contract in both cases, and the party paying for the release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would never have entered into the bargain.³

The discovery of the new facts must, it was said, destroy the identity of the contract.

Examples
from cases

It is not surprising that the strictness of this test has resulted in a dearth of cases on the subject of fundamental mistake. In *Scott v. Coulson*,⁴ however, a contract for the assignment of a policy of life insurance was made upon the basis of an erroneous belief, common to both parties, that the assured was still alive. It was held that the vendor was entitled to the return of the policy and also the moneys payable under it. 'The fact upon which the contract was based', said Romer L.J.,⁵ 'was not the fact.' Similarly in *Galloway v. Galloway*⁶ a husband and wife entered into a separation deed on the assumption that their marriage was valid. In fact it was void. The deed was set aside.

We may also illustrate the operation of this principle with a

¹ [1932] A.C. 161, at p. 236.

² *Ibid.*, per Lord Atkin at p. 223.

³ At p. 253.

² *Ibid.*, at p. 235.

⁴ [1903] 2 Ch. 249.

⁶ (1914), 30 T.L.R. 531.

case from Kenya, decided by the Judicial Committee of the Privy Council under section 20 of the Indian Contracts Act, 1872, which reads:

Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

The case was that of *Sheikh Brothers, Ltd. v. Ochsner*:¹

The appellants contracted with the respondent to grant him a licence to cut, process and manufacture all sisal grown on a particular estate in Kenya of which they were the lessees. In return, the respondent deposited a certain sum of money, and undertook to deliver to the appellants 50 tons of sisal fibre, manufactured by him, each month. The estate was, in fact, not capable of producing such a quantity of sisal as would meet this requirement.

The Judicial Committee were expressly referred to the English authorities on the law of mistake. They held, following the statements in *Bell v. Lever Bros.*, that the parties had both contracted under a mistake of fact essential to the agreement, namely, that the estate was capable of yielding that amount of sisal, and that the contract was void.

Absence of a Genuine Agreement

This class of contract presents considerable difficulties, and it will be convenient to state what are conceived to be the general principles governing this branch of the law, and then to test them by reference to the best known varieties of such contracts. Unilateral mistake

It follows from the essential nature of a contract that if there is no genuine agreement between the parties, or, as is commonly said, if the parties are not *ad idem*, there is no contract. This is only another way of saying that offer and acceptance must correspond exactly, or no contract will ensue. Therefore, if the offeree thinks that the offeror is some person other than he really is, or that the thing offered is something different, or that the terms proposed by the offeror are other than those actually proposed, and if he accepts on that mistaken assumption, it is clear that there is no genuine agreement, for the offer which he has accepted is not the offer made by the other party.

But he may nevertheless be held to have accepted the real offer, and not that which exists merely in his mind, if, to all Objective test often excludes

¹ [1957] A.C. 136.

outward appearances, the offer and acceptance coincide. For it is a rule of our law that the intention of the parties must be inferred from their words and conduct as interpreted by a reasonable man:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.¹

It is evident that in the vast majority of cases the operation of this objective test will exclude the plea that the parties were not in agreement. It will be remembered that in the chapters on the Promise² and on the Terms of a Contract³ it was stated that, as a general rule, the intention of the parties must be construed objectively. So it is clear that the cases in which mistake affects a contract must be considered to be the rare exceptions to this general rule. A man is bound by an agreement to which he has expressed a clear assent. If he exhibits all the outward signs of agreement the law will hold that he has agreed.⁴

Contracts void for mistake Nevertheless it may happen that the law regards a contract as void though at first sight it appears perfectly valid. This may occur in one of three situations:

- (a) where, despite outward appearances, there is no real coincidence between the terms of the offer and those of the acceptance;
- (b) where there is a mistake by one party as to the promise of the other, known to the other;
- (c) where there is a mistake as to the identity of the person with whom the contract is made.

(a) *Offer and acceptance not coincident*

Lack of coincidence between offer and acceptance It may happen that, owing to a mistake on the part of one party, an offer may be innocently accepted in a different sense in which it was intended by the offeror, and the terms in which the contract is expressed may suffer from such latent ambiguity⁵ that it is impossible to say that the conduct of the parties points to one solution rather than another. In such a case one party may say that he did not attach the same meaning to the terms

¹ *Smith v. Hughes* (1861), L.R. 6 Q.B. 597, *per* Blackburn J. at p. 607.

² *Supra*, p. 30.

³ *Supra*, p. 138.

⁴ *Tamplin v. James* (1880), 15 Ch. D. 215; *infra*, p. 268.

⁵ *Viz. supra*, p. 135.

as the other party, and it will be impossible to say that his conduct would have induced a reasonable man to make one deduction rather than the other. The contract will be void because the terms of the offer and the acceptance did not coincide.

If, for example, two things have the same name, and *A* ^{Examples} makes an offer to *B* referring to one of them, which offer *B* accepts thinking that *A* is referring to the other, then provided there is nothing in the terms of the contract to identify one or other of its subject-matter, evidence may be given to show that the mind of each party was directed to a different object: that *A* offered one thing, and *B* accepted another. So in *Raffles v. Wichelhaus*:¹

The defendant agreed to buy from the plaintiff a cargo of cotton 'to arrive *ex Peerless* from Bombay'. There were two ships called *Peerless*, and both sailed from Bombay, but the defendant meant a *Peerless* which arrived in October, and the plaintiff a *Peerless* which arrived in December.

It was held that there was no contract. There was nothing in the agreement which would point to one or other of the vessels as being the one identified in the contract; the offer and acceptance did not coincide.

Similarly, if *A* makes to *B* an offer which is ambiguous in its terms, or is rendered ambiguous by the circumstances surrounding it, and *B* accepts the offer in a different sense from that in which it is meant, then unless an objective construction requires otherwise, *B* may effectively maintain that there is no binding contract. In *Scriven Bros. & Co. v. Hindley & Co.*:²

The plaintiffs instructed an auctioneer to sell certain bales of hemp and tow, which were described in the catalogue as so many bales in different lots with no indication of the difference in their contents. The defendant examined samples of the hemp before the sale intending to bid for the hemp alone. At the auction, the tow was put up for sale, and the defendant, believing it to be hemp, made a bid which was a reasonable one if it had been intended for hemp, but an excessive one for tow. This bid was accepted by the auctioneer, who did not realise the defendant's mistake, but merely thought the bid an extravagant one for tow. The plaintiffs sought to enforce the contract by suing for the price.

It was clear that offer and acceptance did not coincide. The plaintiffs intended to sell tow, the defendant, misled by the auction catalogue, to buy hemp. From an objective viewpoint, there was nothing in the defendant's conduct which would

¹ (1864), 2 H. & C. 906.

² [1913] 3 K.B. 564.

force the conclusion that a reasonable man would have understood the offer in the sense in which the plaintiffs intended it. Accordingly no contract had come into existence, and the defendant was not liable.

It has been said that these are not truly cases of mistake, but rather cases where there is merely no concurrence between the terms of the offer and those of the acceptance. This is true, but it is convenient to deal with them here as proof of a mistake must be adduced before a flaw can be found in the ostensible agreement.

(b) *Mistake by one party as to the promise of the other and known to that other*

Mistake as to the promise Although the conduct of one party is such that a reasonable man would assume that he was assenting to the offer of the other party, yet if that other party knows that he does not really so assent, there will be no genuine agreement. In such a case, a misapprehension on the part of one party may, if known to the other, be sufficient to invalidate the contract.

Responsibilities of parties Nevertheless it is not any misapprehension which will suffice. In entering into a contract a man must use his own judgment or, if he cannot rely upon his judgment, must take care that the terms of the contract secure to him what he wants. *Caveat emptor* is a general rule of the law of contracts. One party is not bound to disclose to the other all material circumstances which might affect the bargain and which are known to him alone. Even if he knows that the other part is contracting under a misapprehension, he is under no duty to disillusion him.¹ Of course, the contract may be one containing statutory implied conditions;² or it may be one which is *uberrimae fidei*;³ or there may be some active fraudulent concealment.⁴ But otherwise mere silence will not constitute a misrepresentation, and each party must protect himself from the consequences of his own mistakes.

But the law will not recognize that a contract has come into existence when a man makes or accepts an offer which he knows that the other party understands in a fundamentally different sense from that in which he makes or accepts it himself. So we find that a mistake by one party as to the promise of the other, and known to that other, will avoid the contract. Only a mistake as to the promise is sufficient; any other

¹ *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; *supra*, p. 218.

² *Supra*, p. 120.

³ *Supra*, p. 212.

⁴ *Supra*, p. 220.

mistake, for example, as to the quality or the substance of the thing contracted for, will not affect consent in this way. Moreover the mistake must be known to the other party; if it is not, the party mistaken will be prevented from denying the ostensible agreement.

We can best illustrate these propositions by an imaginary sale: Illustrations

A sells *X* a piece of china.

(α) *X* thinks that it is Dresden china. *A* thinks it is not. Mistake as to thing sold
Each takes his chance. *X* may get a better thing than *A* intended to sell, or a worse thing than he himself intended to buy; in neither case is the validity of the contract affected.

(β) *X* thinks that it is Dresden china. *A* knows that *X* known to other party
thinks so, and knows that it is not.

The contract holds. *A* must do nothing to deceive *X*, but he is not bound to prevent *X* from deceiving himself as to the quality of the thing sold. *X*'s error is one of motive alone, and although it is known to *A*, it is insufficient.

(γ) *X* thinks that it is Dresden china and thinks that *A* Mistake as to offer
intends to contract to sell it as Dresden china; and *A* knows that it is not Dresden china, but does not know that *X* thinks that he is contracting to sell it as Dresden china. The contract says nothing of Dresden, but is for a sale of china in general terms.

The contract holds. The misapprehension by *X* of the extent of *A*'s offer, *if unknown to A*, has no effect. It is not *A*'s fault that *X* omitted to introduce terms which he wished to form part of the contract.

(δ) *X* thinks it is Dresden china, and thinks that *A* intends known to other party
to contract to sell it as Dresden china. *A* knows that *X* *thinks he is contracting to sell it as Dresden china*, but does not mean to, and in fact does not, offer more than china in general terms.

The contract is void. *X*'s error was not one of judgment as to the quality of the china, as in (β), but was an error as to the nature of *A*'s offer, and *A*, knowing that his offer was misunderstood, nevertheless allowed the mistake to continue. Since *A* intends to offer one thing, and *X* to accept an offer of a materially different thing, there is here an operative mistake, and the contract cannot stand.

This rule is sometimes known as the rule in *Smith v. Hughes*:¹ Rule in *Smith v. Hughes*

The defendant was sued by the plaintiff for the price of oats sold and delivered, and for damages for not accepting oats bargained and sold. It

appeared that the plaintiff offered to sell to the defendant, by sample, a parcel of oats at 35s. a bushel. According to the defendant, the plaintiff described the oats as 'good *old* oats', but the plaintiff denied that the word 'old' had been used. At any rate, this offer was rejected by the defendant's counter-offer of 34s. a bushel, which in turn was accepted by the plaintiff's delivery of the oats. When they were delivered, they were found to be new oats, and quite unsuitable for the defendant's purposes.

The trial judge directed the jury to consider two questions:

- (i) whether the word 'old' had been used by the plaintiff or the defendant in making the contract. If so, they were to give a verdict for the defendant;
- (ii) if the word 'old' had not been used, whether they were of the opinion that the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats. If so, they were to give a verdict for the defendant.

The jury found for the defendant without stating on which ground they based their verdict. On a motion for a new trial, the majority of the Court of Queen's Bench were of the opinion that the second of these two directions would not sufficiently bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff *contracted* that they were old.¹ Hannen J. said:²

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

But this was not necessarily so. The defendant might merely have been mistaken as to the age of the oats, and not as to the plaintiff's promise. If such were the case, the contract would be valid, and a verdict should have been given for the plaintiff.³

In order to relieve the defendant, it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

Accordingly a new trial was ordered.

¹ (1871), L.R. 6 Q.B. 597, *per* Blackburn J. at p. 608.

² At p. 610.

³ *Ibid.*, *per* Hannen J. at p. 611.

The same rule was applied in slightly different circumstances in *Hartog v. Colin & Shields*:¹

The defendants contracted to sell to the plaintiff 3,000 Argentine hare skins, but by a mistake they offered them at so much per *pound* instead of so much per *piece*. It was shown that the price per pound was roughly one third of that per piece, that the negotiations leading up to the sale had proceeded throughout on a price per piece, and that this was the usual practice of the trade. Nevertheless, the plaintiff sought to enforce the sale in the terms of the offer, and sued for non-delivery.

Singleton J. held that the plaintiff must have known that, when he accepted the defendants' offer, they were under a mistake, and that this mistake related to a stipulation of the contract. The agreement was therefore void.

(c) *Mistake as to the identity of the person with whom the contract is made*²

Mistake of this sort can only occur where *A* contracts with *B*, believing him to be *C*: that is, where the offeror has in contemplation a definite and identifiable person with whom he intends to contract. One who makes a general offer which anyone may accept, such as an offer by advertisement, cannot say that he was mistaken as to the identity of an acceptor.

We may start with the proposition that a person cannot constitute himself a contracting party with one who he knows or ought to know has no intention of contracting with him. An offer can be accepted only by the person to whom it is addressed. In *Boulton v. Jones*:³

Boulton had taken over the business of one Brocklehurst, with whom the defendant, Jones, had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst, which Boulton supplied without informing him that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst, he refused to pay for them, and was sued by Boulton for the price.

It was held that he was not liable to pay for the goods.

It is a rule of law [said Pollock C.B.⁴] that if a person intends to contract with *A*, *B* cannot give himself any right under it. Here the order

¹ [1939] 3 All E.R. 566.

² See Goodhart (1941), 57 L.Q.R. 228; Glanville Williams (1945), 23 Can. Bar Rev. 271, 380; Tylor (1948), 11 Mod. L.R. 257; Wilson (1954), 17 Mod. L.R. 515; Unger (1955), 18 Mod. L.R. 259; Smith and Thomas (1957), 20 Mod. L.R. 38.

³ (1857), 2 H. & N. 564. From the report of this case in (1857), 6 W.R. 107 it appears that Boulton knew of the existence of the set-off. ⁴ At p. 565.

in writing was given to Brocklehurst. Possibly Brocklehurst might have adopted the act of the plaintiff in supplying goods and maintained an action for their price. But since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with them.

Nevertheless it must be remembered that offer and acceptance must here, as elsewhere, be understood in an objective sense. The test is not merely 'Did the offeror intend to contract with the person to whom the offer was made?', but also 'How would a reasonable man in the position of the offeree have interpreted the offer?'. So if *A* makes an offer to *B* in mistake for *C*, and *B*, reasonably believing the offer is intended for him, accepts, then *A* is bound even though he can prove that he had made a mistake. In *Upton-on-Severn R.D.C. v. Powell*,¹ the defendant sent for the Upton fire brigade in mistake for the Pershore fire brigade, in whose area he was. The call was accepted in good faith by the Upton brigade, and it was held that the defendant was contractually bound to pay for their services despite his mistake.

But no contract will be formed if the person accepting the offer knows that he is accepting an offer made to him in mistake for someone else. In *Cundy v. Lindsay*:²

A person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron in the same street, fraudulently induced the plaintiffs to send goods to his address, which he afterwards sold to an innocent purchaser, the defendant. The plaintiffs sued the defendant for the return of the goods.

If the contract between the plaintiffs and Blenkarn was merely voidable for fraud, the defendant would be entitled to retain the goods as he had taken them in good faith and for value. But if the contract was void for mistake, Blenkarn could pass no title to the goods to the defendant because as between him and the plaintiffs there was no contract. The House of Lords held that the plaintiffs were entitled to succeed: *

Of him [(Blenkarn) said Lord Cairns³] they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.

¹ [1942] 1 All E.R. 220; *supra*, p. 30.

² (1878), 3 App. Cas. 459.

³ At p. 465.

When he accepted the goods, Blenkarn knew that the plaintiffs thought they were entering into a contract with Blenkiron. He could not accept an offer which was not addressed to him. The contract was void *ab initio*.

But if *A*'s mistake does not go to the *identity* of the other party, if he does intend to make a contract with that particular person, then the fact that he would not have made it if he had not been labouring under some mistake regarding the personality of the other party will not prevent the formation of a contract. Mistake as to *attributes*, for example, as to the solvency or social position of that person, is insufficient.¹ In *King's Norton Metal Co. v. Edridge*:²

Mistake
as to
attributes
ineffective

The plaintiffs, who were metal manufacturers, received a letter purporting to come from 'Hallam & Co.' in Sheffield asking for quotations for metal wire. On the letterhead was a picture of a large factory and a list of overseas depots. The plaintiffs replied, and Hallam & Co. ordered the wire. In fact, there was no such firm as Hallam & Co. The letters had been written, and the writing paper prepared, by a fraudulent person, one Wallis. Wallis subsequently sold the wire so obtained to the defendants. The plaintiffs sued the defendants, contending that the contract with Hallam & Co. was void, and that the wire was therefore still their property.

The Court of Appeal held that the company had intended to contract with the writer of the letter. No doubt they would not have done so if they had known what sort of a person the writer was, and that he was contracting under an *alias*. But a contract had been made which was not void on the ground of mistake, but only voidable for fraud. Consequently the property in the goods delivered had passed under it to Wallis, and an innocent purchaser from him acquired a good title to them. A. L. Smith L.J. is reported, as follows:³

The question was, With whom, upon this evidence, which was all one way, did the plaintiffs contract to sell the goods? Clearly with the writer

¹ There is nevertheless no more intrinsic validity in the distinction between *identity* and *attributes* than between *substance* and *qualities* (*supra*); but the law does conveniently distinguish between cases where there are two individuals in the picture (i.e. *A* contracts with *B* in mistake for *C*) and cases where there is only one (i.e. *A* contracts with *B* in the belief that *B* is not *B*). In (1945), 23 Can. Bar Rev. 278, Glanville Williams says cogently "The conclusion is that a so-called "error of identity" consists in confusing (the attributes of) two or more persons. An "error of attributes" consists in misapprehending (the attributes of) a single person". Cf. Wilson (1954), 17 Mod. L.R. 515, and the reply by Unger (1955), 18 Mod. L.R. 259.

² (1897), 14 T.L.R. 98. Cf. *Newborne v. Sensolid (Great Britain), Ltd.*, [1954] 1 Q.B. 45.

³ At p. 99.

of the letters. If it could have been shown that there was a separate entity called Hallam & Co. and another entity called Wallis then the case might have come within the decision in *Gundy v. Lindsay*. In his opinion there was a contract by the plaintiffs with the person who wrote the letters, by which the property passed to him. There was only one entity trading it might be under an *alias*, and there was a contract by which the property passed to him.

Therefore, in order to establish mistake as to identity, the party contracting must prove not merely that he did not intend to contract with the person with whom the apparent contract was concluded, but also that there was in existence a third identifiable person with whom he did intend to contract.¹

Contracts
inter
praesentes Perhaps the case in which this question is most difficult to resolve is that in which the transaction takes place not, as in the cases which we have so far considered, between parties at a distance from one another, but in each other's presence. In *Phillips v. Brooks*:²

A man, North, called in person at the plaintiff's shop and selected some pearls and a ring. He wrote out a cheque for £3,000, saying 'I am Sir George Bullough' (a person of credit whose name was known to the plaintiff) and giving Sir George Bullough's address. The plaintiff allowed him to take away the ring which North then pledged to the defendant for £350, the defendant having no notice of the fraud. The plaintiff sued the defendant for the return of the ring, alleging that in the circumstances he had never parted with the property in it.

On these facts it was held by Horridge J. that although the plaintiff believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver it to the person who came into his shop. The contract, therefore, was not void on the ground of mistake, but only voidable on the ground of fraud, and the defendant had acquired a good title to the ring. The judge cited with approval an American case in which Morton C.J. said:³

The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and term of payment, the person selling and the person buying. . . . He [the plaintiff] could not have supposed that he was selling to any other person; his intention was to sell to the person present and identified by sight and hearing; it does not affect the sale because the

¹ *Gordon v. Street*, [1899] 2 Q.B. 641; Goodhart (1941), 57 L.Q.R. 228; Unger (1955), 18 Mod. L.R. 259. Cf. Wilson (1954), 17 Mod. L.R. 515.

² [1919] 2 K.B. 243, criticized by Goodhart (1941), 57 L.Q.R. 228, at p. 241.

³ *Edmunds v. Merchant Despatch Co.* (1883), 135 Mass. 283.

buyer assumed a false name and practised any other deceit to induce the vendor to sell.

It does not follow from *Phillips v. Brooks* that there can be no operative mistake as to identity *inter praesentes* though obviously, when two parties contract with one another face to face, the proper inference will normally be that each intended to contract with the other and not with someone else. But two earlier cases show that this inference is not inevitable. In *Hardman v. Booth*:¹

The plaintiff called in person on the place of business of a firm, Gandell & Co. The firm was run solely by Thomas Gandell, but employed a clerk named Edward Gandell. This clerk interviewed the plaintiff and fraudulently persuaded him that he (Edward Gandell) was a member of the firm. The plaintiff thereupon despatched goods to that address, but invoiced them to 'Edward Gandell & Co.'. Edward Gandell pledged the goods with the defendant, who took them *bona fide* and without notice of the fraud. The plaintiff sued the defendant for return of the goods.

It was held that the plaintiff was entitled to the goods. It was clear that his intention had been to contract with Gandell & Co. and not with Edward Gandell. The contract was therefore void. Also in *Lake v. Simmons*:²

The plaintiff, a jeweller, was insured with a company against loss by theft, with the exception of jewellery 'entrusted to a customer'. A woman named Esme Ellison, posing as the wife of a wealthy customer, one Van der Borgh, made a few purchases from the plaintiff to inspire confidence, and then was allowed to take away two pearl necklaces of considerable value 'on approval' for her supposed husband. She made away with the necklaces, and the question arose whether the loss was covered by the insurance policy, or came within the exception clause.

The House of Lords held that the loss was covered by the insurance:

The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question.³

It could, of course, be argued that the jeweller intended to contract with the woman in the shop, merely investing her with attributes of Mrs. Van der Borgh,⁴ but the House of Lords held otherwise. Viscount Haldane distinguished *Phillips v.*

¹ (1863), 1 H. & C. 803.

² [1927] A.C. 487.

³ *Ibid.*, per Viscount Haldane at p. 500

⁴ She did not exist. Van der Borgh was a widower.

Brooks by pointing out that, in that case, the fraudulent representation was not made until *after* the parties had agreed on the sale, that is, after the contract had been made and the property in the jewellery passed to North.¹ It induced merely the delivery of the goods and not the formation of the contract itself. This would seem to indicate that if North had introduced himself as Sir George Bullough on entering the shop, it might well have been that the proper conclusion to be drawn would have been that the plaintiff had intended to contract with Sir George Bullough and no one else, and this fact being known to North, the contract would not have been voidable but void.

No third
person in
existence

Finally we come to a problem in this subject which is one of considerable difficulty.² This is where *A* contracts with *B* in the belief that *B* is not *B*, and *B* knows of this error.

Suppose that *B*, knowing that *A* will certainly refuse to contract with him, disguises himself so as to conceal his identity, and effects a purchase of goods from *A*.

It might be thought that this situation is no different from that where *A* contracts with *B* in mistake for *C*, and *B* realizes the mistake. But there is in fact a considerable difference. In the latter situation the contract is void because *B* cannot accept an offer which he knows is not intended for himself but for *C*. In the former, there is no third person to whom the offer is really addressed; it is addressed to *B*, even though *A* mistakenly believes that he is not *B*. *B* is not, therefore, prevented from accepting an offer addressed to himself, and the contract will be valid and binding.

In certain circumstances, however, the offer made by *A* may expressly or impliedly contain a stipulation that *B* is not *B*. These are the terms upon which *A* is prepared to contract, and, as we have seen,³ it is not possible for an offeree to accept an offer which he knows is made to him in different terms from those in which he purports to accept it. *B* cannot, therefore, accept such an offer. In *Said v. Butt*:⁴

¹ At p. 501. No trace of this as a material distinction can be found in *Phillips v. Brooks* itself.

² The subsequent paragraph relies heavily on the convincing argument of Professor Goodhart in (1941), 57 L.Q.R. 228, at pp. 241 ff.

³ *Supra*, p. 256.

⁴ [1920] 3 K.B. 497 (this case was primarily concerned with the question of an undisclosed principal and not with mistake); *Gordon v. Street*, [1899] 2 Q.B. 641.

The plaintiff wished to attend the first-night performance of a certain play. He knew from past experience, including an express refusal, that if he himself applied at the box-office for a ticket, it would be refused him for personal reasons. He therefore got a friend to buy a ticket without disclosing that he was buying it for the plaintiff. He was nevertheless not admitted to the theatre, and sued for breach of contract.

It was held that no contract had come into existence. The plaintiff knew that the theatre would not contract with him, and he could not, by the mere device of utilizing the name and services of an agent, constitute himself a contractor with the defendants against their knowledge, and contrary to their express refusal.

The difficulty is to know in what circumstances such a term is to be implied into the offer. In *King's Norton Metal Co. v. Edridge*¹ the mistaken plaintiff was unable to satisfy the court that such an implication should be made. This decision does not appear to have been cited to Tucker J. in the case of *Sowler v. Potter*²—a decision which has incurred almost unanimous disapproval:

The defendant had, at an earlier date, been convicted in the name of Ann Robinson of allowing disorderly conduct in a café. She subsequently assumed the name of Ann Potter, and the plaintiff had granted her a lease of certain premises under that name. The plaintiff gave evidence that, at the time that he entered into this contract, he knew of the record of Ann Robinson, and that he would have never granted the lease to the defendant had he known that she and Ann Robinson were the same person. The plaintiff therefore contended that the lease was void for mistake.

The Court upheld this contention. Tucker J., in arriving at his decision, relied on a passage from the work of the eighteenth-century French jurist, Pothier, which had been more than once cited with approval in English cases:³

Pothier's
test

Whenever the consideration of the person with whom I am willing to contract *enters as an element into the contract*⁴ which I am willing to

¹ *Supra*, p. 261.

² [1940] 1 K.B. 271, criticized by Denning L.J. in *Solle v. Butcher*, [1950] 1 K.B. 671, at p. 691, and by Goodhart (1941) 57 L.Q.R. 228.

³ Pothier, *Traité des Obligations*, P. I, c. 1, s. 1, Art. III, § 1, as cited in *Smith v. Wheatcroft* (1878), 9 Ch. D. 223, *per* Fry J. at p. 230, *Gordon v. Street*, [1899] 2 Q.B. 641, at p. 647; *Phillips v. Brooks* [1919] 2 K.B. 243, at p. 248; *Lake v. Simmons*, [1927] A.C. 487, at p. 501; *Sowler v. Potter*, [1940] 1 K.B. 271, at p. 274. See (1957), 20 Mod. L.R. 38.

⁴ The French text reads: "Toutes les fois que la considération de la personne avec qui je veux contracter, entre pour quelque chose dans le contrat que je veux faire, l'erreur sur la personne détruit mon consentement, et rend par conséquent

make, error in regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.

'This case of landlord and tenant', said the learned judge, 'is clearly a case where the consideration of the person with whom the contract was made is a vital element in the contract, and that, therefore, if there was any mistake on the part of the plaintiff with regard to the identity of the person with whom she was contracting, the contract is void *ab initio*.' It is believed, however, that this statement of Pothier, even if it could be regarded as correct in requiring that the identity of the contracting party should be material to the contract, does not, as here translated, constitute a sound positive test of mistake in English law. The proper approach in such a case as *Sowler v. Potter* would be to inquire whether a stipulation could be implied into the offer that Ann Potter was not Ann Robinson, and whether this stipulation was known to the offeree. The answer is clear: no such stipulation could possibly be implied, and the contract should not have been void.

la convention nulle.' *Example*: If, intending to have a picture painted by N., I make a contract to have this picture painted by J. whom I mistake for N., the contract is void for want of consent on my part, for I did not intend to have a picture painted by J. but by N. . . . The consideration of the person of N., and of his reputation, entered into the contract. . . . 'Au contraire lorsque la considération de la personne avec qui je croyais contracter n'est entrée pour rien dans le contrat, et que j'aurais également voulu faire ce contrat avec quelque personne que ce fût, comme avec celui avec qui j'ai cru contracter, le contrat doit être valable.'

Example: I buy from a bookseller an unbound book which he undertakes to deliver to me bound. Although the bookseller, at the time of the sale, supposes that he is contracting with Peter whom I resemble, and even calls me Peter without my disillusioning him, this error . . . does not avoid the contract, and he cannot refuse to deliver the book at the price agreed if it has appreciated in value since the sale. For, although he believed he was selling the book to Peter, nevertheless since it was a matter of indifference to him who purchased his goods, it was not precisely and personally to Peter that he intended to sell, but to any person who would pay him the price he asked—whoever he might be. And so it is correct to say that I was that person, that it was to me that he intended to sell the book, and to me that he must now deliver it.

It is submitted that this passage does not correctly represent the position in English law. Unless the words 'entre pour quelque chose dans le contrat' can be taken to mean 'enters as a term into the contract', it is clear that the two systems approach the question of mistake as to the person from an entirely different standpoint.

II. MISTAKE IN EQUITY

The effect of a mistake at common law, if it operates at all, is to render the contract void *ab initio*; but, as we have already seen in the case of innocent misrepresentation, equity may be prepared to grant relief where the common law refuses to intervene. The type of relief granted depends not so much upon the nature of the misapprehension under which the parties, or one of them, contract, but rather upon the particular remedies available to a Court of Equity when confronted with a situation which calls for equitable intervention.¹ In the case of mistake, these remedies appear to be three:

- (i) refusal of a decree of specific performance;
- (ii) rectification of a written contract;
- (iii) rescission.

In no case, however, does equitable relief take the form of a decree that the contract is a nullity from the beginning; at the most, the contract is voidable, and not void.

Refusal of Specific Performance

At common law, a contract for the sale or transfer of property was treated as a purely personal agreement, the remedy for the breach of which was an action at law for damages. But equity would, if invoked, compel the transfer of the property involved by means of a decree of specific performance. If, however, one of the parties contracted under a mistake which would render it inequitable for the other to enforce the contract, this would clearly afford a good defence to an action in equity for specific performance of the contract. In *Webster v. Cecil*:²

The defendant offered to sell the plaintiff several plots of land for £1,250. Immediately after he had despatched the offer he discovered that, by a mistake in adding up the prices of the plots, he had offered his land for sale at this price instead of the £2,250 which he had intended. He informed the plaintiff of the mistake without delay, but not before the plaintiff had concluded the contract by acceptance. The plaintiff must have been taken to have known of the mistake as the defendant had previously refused an offer of £2,000. The plaintiff now sought specific performance of the contract.

¹ Consequently it seems that a mistake of law will sometimes be effective: *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149; *Stone v. Godfrey* (1854), 5 D.M. & G. 76, *per* Turner L.J. at p. 90; *Rogers v. Ingham* (1876), 3 Ch. D. 351, *per* Melhuish L.J. at p. 357; *Allcard v. Walker* [1896] 2 Ch. 369, *per* Stirling J. at p. 381.

² (1861), 30 Beav. 62; *Manser v. Back* (1848), 6 Hare 443.

This was refused. The plaintiff was left to such action at law as he might be advised to bring.¹

but will not
always
do so Specific performance is a discretionary remedy.² This does not mean that a decree will be arbitrarily refused, but if it would cause undue hardship in the circumstances of the case, the Court will not be prepared to grant a decree, but only to award damages for breach. Mistake of a type which is insufficient to render the contract void at law may thus be a ground for resisting a decree, as it would be harsh to enforce performance of a contract against one who has entered into it under a mistake. In *Malins v. Freeman*.³

The plaintiff put up for sale by auction certain land in five lots. The defendant attended the sale and bid successfully for lot No. 3, which was knocked down to him. He then discovered that he had bid for the wrong lot, as his intention was to bid for an estate to be sold directly after the defendant's land. Having entered the sale while lot No. 2 was being sold, he had believed the next lot offered for sale to be the one he wished to buy.

The Court refused a decree of specific performance of this contract. Even though the defendant's mistake was due to his own carelessness and to no fault of the plaintiff, the Court was prepared to exercise its discretion in his favour, leaving the plaintiff to claim damages at law. On the other hand, in *Tamplin v. James*⁴ it was held that no such hardship existed. In that case, the defendant bid for and bought an inn and out-buildings in the mistaken belief that the lot also included two pieces of garden attached thereto. There was little excuse for this misapprehension as plans of the property to be sold were exhibited at the sale. The Court granted a decree of specific performance to the seller.

Rectification

Rectifica-
tion of
written
contracts

Where a contract has been reduced to writing, or a deed executed, and the writing or deed, owing to mutual mistake, fails to express the concurrent intention of the parties at the time of its execution, the Court will rectify the written instrument in accordance with their true intent.

¹ In fact he would have no action for the contract would be void: see *Hartog v. Colin and Shields*, [1939] 3 All E.R. 566; *supra*, p. 259.

² See generally Snell's *Principles of Equity* (24th ed.), pp. 538, 549.

³ (1837), 2 Keen 25; *Calverley v. Williams* (1790), 1 Ves. Jun. 210.

⁴ (1880), 15 Ch. D. 215.

In *Craddock Brothers v. Hunt*,¹ for example:

A vendor agreed orally to sell to a purchaser a certain piece of property. By a mistake, the written contract embodying this agreement included an adjoining yard which the parties had exempted from the sale, and the subsequent conveyance actually conveyed this land to the purchaser.

The Court ordered that the conveyance should be rectified to bring it into line with the parties' oral agreement.

But before the remedy of rectification is made available certain conditions must be satisfied. Require-
ments

In the first place, the parties must have been in final and full agreement prior to the execution of the instrument which it is sought to rectify. Although there is some judicial support for the view that this agreement should amount to an actual enforceable contract,² the better opinion would seem to be that there is jurisdiction to rectify where the parties have made a mistake in their attempt to embody in the written instrument their concurrent intentions existing at the time of its execution.³ An enforceable contract need not be shown. (i) full and
final agree-
ment

Secondly, the party seeking to have the instrument rectified must adduce clear and unambiguous evidence that its terms do not accurately record the true intention of the parties at the time.⁴ (ii) clear
evidence
of mistake

Thirdly, the intention of the parties as expressed in the prior agreement must have continued unchanged up to the time of the execution of the written instrument,⁵ and there must be a literal disparity between the terms of the two transactions. Proof of an inner misapprehension is insufficient. In *Frederick E. Rose (London), Ltd. v. William H. Pim & Co., Ltd.*:⁶ (iii) literal
disparity

The plaintiffs received from their Middle East house an order for up to five hundred tons of 'Moroccan horsebeans described here as feveroles'. The plaintiffs did not know what feveroles were, and inquired their meaning from the defendants. The defendants informed them that they were simply horsebeans, and so the plaintiffs orally contracted to buy from

¹ [1923] 2 Ch. 136; *U.S.A. v. Motor Trucks, Ltd.*, [1924] A.C. 196. *Viz. supra*, p. 137, and see Snell's *Principles of Equity* (24th ed.), p. 569.

² *Mackenzie v. Coulson* (1869), L.R. Eq. 368, at p. 375; *Faraday v. Tamworth Union* (1916), 86 L.J. Ch. 436, at p. 438; *Higgins (W.), Ltd. v. Northampton Cpn.*, [1927] 1 Ch. 128, at p. 136; *U.S.A. v. Motor Trucks, Ltd.*, [1924] A.C. 196, at p. 200.

³ *Shipley U.D.C. v. Bradford Cpn.*, [1936] Ch. 375; *Crane v. Hegemann-Harris Co., Inc.*, [1939] 1 All E.R. 662, affirmed [1939] 4 All E.R. 68.

⁴ *Freudensen v. Rothschild*, [1941] 1 All E.R. 430.

⁵ *Fowler v. Fowler* (1859), 4 De G. & J. 250.

⁶ [1953] 2 Q.B. 450; *supra*, p. 251.

the defendants a quantity of horsebeans to meet this order. A subsequent written agreement embodied the same terms. In fact, however, feveroles were quite another type of bean, and the plaintiffs claimed to have the written agreement rectified to read feveroles, intending to claim damages on the agreement if so rectified.

The Court of Appeal refused rectification. Both the oral and the written contracts were for horsebeans. There was no literal disparity between them. The only mistake was in the minds of the parties at the time. As Denning L.J. put it:¹

Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract.

The remedy of rectification is normally only granted in respect of a mutual mistake, to correct the erroneous expression of a prior agreement. Where the mistake is unilateral, the Court is reluctant to intervene, and not unless some fraud or misrepresentation or unfair dealing on the part of the other party is shown.²

Rescission

Rescission We have already seen that a party to a contract may obtain the right to rescind the contract where he has been induced to enter into it by an innocent material misrepresentation,³ or by fraud, whether actual or constructive,⁴ or by non-disclosure of a material fact where the transaction is one which is *uberimae fidei*.⁵ This remedy is also available in certain circumstances where one or both of the parties have contracted under a mistake.

Unilateral mistake Where the mistake is unilateral, that is to say, where only the party seeking to have the contract set aside was under a mistake, the other party to the contract must be guilty of some conduct which would render it inequitable for him to insist that the agreement should be strictly performed. He may, for example, have contributed to the mistake either by a positive

¹ At p. 461.

² *Wood v. Scarth* (1855) 2 K. & J. 33, at p. 41; *May v. Platt*, [1900] 1 Ch. 616; *Selle v. Butcher*, [1950] 1 K.B. 671, at p. 692. And see such cases as *Garrard v. Frankel* and *Paget v. Marshall*; *infra*, p. 272.

³ *Supra*, p. 201.

⁴ *Supra*, pp. 208, 211.

⁵ *Supra*, p. 212.

misrepresentation¹ or by some lack of care in framing his offer,² or he may have accepted an offer which he knew was inaccurately expressed in relation to the offeror's true intention at the time.³ But there must be present some element of unfairness or sharp practice which would justify the intervention of the equitable remedy. In *Torrance v. Bolton*:⁴

Property was put up for sale by auction, having been advertised as an 'absolute freehold reversion'. But the conditions of sale, which were read out by the auctioneer, disclosed that it was encumbered by three mortgages. The plaintiff, who was deaf, did not hear this announcement, and bid on the assumption that he was buying something more substantial than a mere equity of redemption. The property was knocked down to him.

He succeeded in having the agreement set aside. The misleading advertisement cast upon the seller the duty of showing that the plaintiff had not been misled, and it was clear from the plaintiff's conduct that he did not know what he was buying. James L.J. pointed out that fraud was not the only ground upon which a contract might be set aside; rescission was available in any case 'in which the Court is of the opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained'.⁵

Rescission is a discretionary remedy, and, in the exercise of its discretion, the Court has power in equity to attach to the rescission such terms as justice may require in order to effect a *restitutio in integrum*. This was done in *Cooper v. Phibbs*,⁶ a case in which the House of Lords set aside a contract on the ground of *mutual* mistake: Setting aside on terms

The petitioner agreed with the defendants to take a lease of a salmon fishery which both parties believed to be the property of the defendants. It was later discovered that the fishery belonged to the petitioner as tenant in tail. He filed a petition asking for cancellation of the agreement and for 'such further relief as the nature of the case might admit of, and as to the Court might seem fit'.

Lord Westbury said:⁷

If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.

¹ *Solle v. Butcher*, [1950] 1 K.B. 671, at p. 692.

² *Torrance v. Bolton* (1872), L.R. 8 Ch. App. 118.

³ *Garrard v. Frankel* (1862), 30 Beav. 445.

⁴ (1872), L.R. 8 Ch. App. 118.

⁵ At p. 124.

⁶ (1867), L.R. 2 H.L. 149.

⁷ At p. 170; he dismissed any misrepresentation as immaterial.

But in granting rescission of the contract, the House of Lords ordered that the defendants should have a lien on the fishery for the money which they had spent on improving the property.

In *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.*:¹

A company became insolvent and went into liquidation. In the company's factory were 33 looms. If these were attached to the realty, they would be fixtures and belong to the plaintiff bank as mortgagees; if not, they would pass to the Official Receiver and be sold for the benefit of the company's creditors. The bank's representatives and those of the Receiver inspected the factory and found that they were not attached. In reliance upon this assumption, the bank concurred in a consent order for their sale. It later appeared that the looms had been wrongfully loosened. The bank now sought to have the consent order set aside.

It was held that the order had been made on the basis of a common and mutual mistake of the parties, and that it should be set aside.

It seems to me [said Kay L.J.]² that both on principle and on authority, when once the Court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the Court may set it aside, and the Court has ample jurisdiction to set aside the order founded upon that agreement.

Similarly in *Scott v. Coulson*³ a contract for the assignment of a life insurance policy was set aside, the parties having contracted in the mistaken belief that the assured was still alive.

Rectifica-
tion or
rescission
in cases
of uni-
lateral
mistake

Although, as we have seen, it is normally required that for *rectification* to be granted the mistake must be mutual, in certain cases where the plaintiff is seeking rectification on the ground of unilateral mistake, the Court will put the defendant to his election whether to accept the rectification or have the contract rescinded. In *Garrard v. Frankel*:⁴

The plaintiff was the owner of certain property. He entered into negotiations to lease the property to the defendant, and these proceeded on the basis that the rent was to be in the region of £240 to £230 per year. By a mistake the plaintiff inserted in the draft lease the figure of £130 instead of £230, and the lease and counterpart were executed without this error being discovered. The plaintiff asked for the lease to be rectified.

¹ [1895] 2 Ch. 273; *Beauchamp (Earl) v. Winn* (1873), L.R. 6 H.L. 223.

² At p. 284. See also Vaughan Williams J. at p. 276.

³ [1903] 2 Ch. 249. The assignment was, in fact, void at law, but it would also have been voidable in equity.

⁴ (1862), 30 Beav. 445.

It was held that the defendant must, in view of the negotiations, be taken to have known of the mistake, and that he could not thus inequitably take advantage of it. He was given the choice either to take the lease at £230, or to have it set aside. Also in *Paget v. Marshall*:¹

The plaintiff offered to lease to the defendant a block of three houses consisting of the first, second, third and fourth floors of each house, at a rent of £800. The defendant accepted the offer and a lease was executed in these terms. The plaintiff subsequently alleged that, by a mistake, the first floor of one house had been included in the offer when he had intended all along to reserve it for his own use. He now sought rectification of the lease.

Had there been a mutual mistake, rectification could clearly have been granted. But the Court came to the conclusion that only the plaintiff had been mistaken. Bacon V.-C. inclined to the opinion that the defendant probably knew of the mistake, but he hesitated to find him guilty of fraud. He was to elect whether to submit to rectification or to have the lease cancelled.

These decisions have been criticized as 'anomalous',² and it has been said that there is no jurisdiction in equity to order rectification of a contract on the ground of unilateral mistake in the absence of fraud, or something akin to fraud.³ But the power of the Court seems somewhat wider than this. If it would be inequitable for one party to take advantage of the other's mistake, then both parties will be put into the same position as if the original offer were still open.⁴

The object of the Court [said Bacon V.-C.⁵] is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened.

At any rate, together with such cases as *Cooper v. Phibbs* and *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.*, these decisions have been used by the Court of Appeal to form the basis of a new and general doctrine of mistake in equity: that the Court has a discretionary jurisdiction to grant such relief and upon such terms as in the circumstances of the case may seem just.

¹ (1884), 28 Ch. D. 255; *Harris v. Pepperell* (1867), L.R. 5 Eq. 1; *Bloomer v. Spittle* (1872), L.R. 13 Eq. 427.

² Snell's *Principles of Equity* (24th ed.), p. 571.

³ *May v. Platt*, [1900] 1 Ch. 616, per Farwell J. at p. 623.

⁴ Pollock, *Principles of Contract* (13th ed.), p. 394.

⁵ *Paget v. Marshall* (1884), 28 Ch. D. 255, at p. 267; *Solle v. Butcher* [1950] 1 K.B. 671, at p. 696.

Solle v. Butcher This principle was first enunciated in *Solle v. Butcher*,¹ the facts of which have been previously noted.² In that case the parties contracted under a mutual mistake of fact that a flat leased to the plaintiff was a 'new' dwelling house for the purpose of the Rent Restriction Acts and so could be let at a rent of £250 per year instead of the £140 which might lawfully be demanded. To an action by the plaintiff to recover the rent overpaid, the defendant pleaded that the lease should be rescinded on the ground of mistake. The Court ordered the rescission of the lease but on the terms (*inter alia*) that the plaintiff should be permitted to elect whether to accept the rescission or to claim a new lease at the full agreed rent of £250 per year. The judgment of Denning L.J. contains a statement of the circumstances in which the Court will intervene:³

Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequence of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of the opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance v. Bolton* per James L.J.⁴

The court had, of course, to define what it considered to be unconscientious, but in this respect equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake. . . .

A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental, and that the party seeking to set it aside was not himself at fault.

From this passage we may perhaps derive some idea of the requirements which must be satisfied before the Court will grant relief. In the first place, one or both of the parties must have contracted under a mistake. If the mistake is mutual, then in some sense it must be 'fundamental' or 'material' before the Court will intervene. If it is unilateral, then it must either have

¹ [1950] 1 K.B. 671, although it was anticipated by the important case of *Allcard v. Walker*, [1896] 2 Ch. 369.

² *Supra*, p. 250.

³ At p. 692.

⁴ (1872), L.R. 8 Ch. App. 118, at p. 124.

been induced by a misrepresentation or have been known, actually or inferentially, to the other party when he concluded the contract. Secondly, the circumstances of the case must be such that it would be inequitable for the party seeking to uphold the contract to rely on his strict rights at common law. Thirdly, the party seeking to set the contract aside must not himself have been at fault.

This decision has been criticized on the ground that there is no authority for holding that the Courts have jurisdiction to relieve parties from the consequence of their own mistakes where the contract is not void at law and there has been no misrepresentation.¹ It is undoubtedly true that it constitutes an extension of previously existing equitable principle, but in view of the very narrow scope of mistake at common law, there is considerable force in the argument that the Court should be allowed a residuary discretion to impose such a solution as justice demands.

Relationship of Equity to Common Law Mistake

One of the most difficult problems in this subject is to discover the precise relationship of the equitable remedies set out above to the doctrine of mistake at common law.²

Before the Judicature Act, 1873, common law and equity were administered in separate jurisdictions. If a plaintiff applied to the Court of Chancery for equitable relief on the ground of contractual mistake, the Court did not first have to inquire whether or not the contract was void at common law; it had its own remedies and followed its own principles in granting or refusing relief. It is therefore misleading to suggest, as does Denning L.J. in *Solle v. Butcher*,³ first, that the intervention of equity presupposed that the contract was good at law, or secondly (and somewhat inconsistently) that if the contract was void at law, equity would automatically have had to follow the law. The truth is that the Court of Chancery did not trouble itself about the position at law, unless, of course, there had been an actual judgment. Such contracts as those in *Webster v. Cecil*⁴ and *Garrard v. Frankel*⁵ would also have been void at common law, but the cases were decided on equitable principles alone.

¹ Slade (1954), 70 L.Q.R. 385, at p. 407.

² See Grunfeld (1952), 15 Mod. L.R. 297.

³ [1950] 1 K.B. 671, at pp. 692, 694.

⁴ (1861), 30 Beav. 62; *supra*, p. 267.

⁵ (1862), 30 Beav. 445; *supra*, p. 272.

and after Since 1875 the rules of common law and equity have been applied in all divisions of the High Court of Justice, and the particular rule to be applied in the case of contractual mistake has depended upon the nature of the relief demanded. In *Cundy v. Lindsay*,¹ for example, the case was decided according to common law principles because the plaintiff pleaded that the contract was void. In *Paget v. Marshall*,² on the other hand, the plaintiff's claim to have the contract rectified meant that the case was to be determined according to equitable rules. Until *Solle v. Butcher* there had been no real consideration of their relationship one with the other.

In that case, however, Denning L.J. put forward the opinion that equity has somehow superseded the common law where contractual mistake is concerned.³ For instance, he considers that *Smith v. Hughes*⁴ and *Cundy v. Lindsay*⁵ would nowadays be cases where the contract should be voidable and not void. The authority for this view would presumably be that provision in the Judicature Act, 1873,⁶ which lays down that where the rules of common law and equity are in conflict or at variance, the rules of equity are to prevail. It is doubtful, however, whether this is a proper case for the application of this provision. The better view would seem to be that, since 1875, the Court must first consider, if so pleaded, the question of common law mistake. If the contract is pronounced void, no question of equitable relief will arise. If on the other hand, the contract is valid, the Court may then proceed to consider the possibility of any further relief in equity which may have been asked for by the parties. The mere fact that the contract is good at common law does not preclude rescission in equity on the same grounds.⁷ *Smith v. Hughes* and *Cundy v. Lindsay* are still void for common law mistake; but in cases such as *Solle v. Butcher* where the contract is valid at common law, it may nevertheless be rescinded if the requirements which we have mentioned are fulfilled.

¹ (1878), 3 App. Cas. 459; *supra*, p. 260.

² (1884), 28 Ch. D. 255; *supra*, p. 273.

³ [1950] 1 K.B. 671, at p. 693. Elsewhere he seems to conceive of the role of equity as merely supplementary. ⁴ (1871), L.R. 6 Q.B. 597; *supra*, p. 257.

⁵ (1878), 3 App. Cas. 459; *supra*, p. 260.

⁶ 36 & 37 Vict., c. 66, s. 25 (11), now the Judicature Act, 1925 (15 & 16 Geo. V, c. 49), s. 44.

⁷ *Leaf v. International Galleries*, [1950] 2 K.B. 86; *Frederick E. Rose (London), Ltd. v. William H. Pim Jr. & Co., Ltd.*, [1953] 2 Q.B. 450, at p. 460; *Oscar Chess, Ltd. v. Williams*, [1957] 1 W.L.R. 370, at p. 373.

CHAPTER IX

ILLEGALITY

THERE is yet one more factor which may defeat an ostensibly valid contract. It is that of illegality—the illegality of the object which the parties have in view. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract are complied with, yet if these objects are in contemplation of the parties when they entered into the agreement the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects which will invalidate an agreement. The second is the effect of the presence of such objects upon the contracts in which they appear.

Two subjects of inquiry: (1) the classification of agreements invalidated by law, (2) the effects of the invalidation

I. CLASSIFICATION OF AGREEMENTS WHICH ARE ILLEGAL OR VOID

An agreement may be invalidated either by express statutory enactment or by the rules of common law. These may strike at the agreement itself, or at some purpose which one or both of the parties intend to make of it.

Further, the law may refuse to assist in any way a person who founds his cause of action upon such an agreement or it may simply say that such an agreement is not to have legal effect. In the former case the agreement is illegal; in the latter it is void. But inasmuch as the distinction between these two types of transaction is not always clear, and even the judges seem sometimes to treat the two terms as interchangeable, it is proposed here merely to classify those agreements which may be subsumed under either of these two heads. The distinction between illegal and void agreements will be discussed later in this chapter.¹

Contracts which are Illegal or Void by Statute

A statute may declare that the object of a contract, or contract itself, is illegal, or that it is void. There is then no doubt of the

Effects of statutory prohibition

¹ *Infra*, p. 312.

intention of the legislature that such a contract should not be enforced. 'What is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action.'¹

Examples may be found in section 141 of the Army Act, 1881,² which prohibits the assignment by an army officer of his deferred pay or pension; in the Dangerous Drugs Act, 1951,³ which makes illegal the sale of certain poisons and drugs; and in the Gaming Act, 1845⁴ (referred to below), which renders null and void all contracts or agreements by way of gaming or wagering.

But a statute may impose a penalty on the parties to a contract, without declaring it to be illegal or void. The effect in such a case depends upon the proper construction of the particular statute. Where the words of a statute leave room for doubt as to its intention, it is material to ask whether the object of the Act in imposing the penalty is merely to protect the revenue, or whether its object, or one of its objects, is to protect the general public or some class of the general public by requiring that the contract shall be accompanied by certain formalities or conditions, as, for example, registration in the case of a moneylender. In the latter case it is probable that the act for the doing of which the penalty is imposed is impliedly prohibited by the statute and therefore illegal.⁵ It may also be useful to ask whether the penalty is imposed once and for all, or whether it is a recurrent penalty imposed every time the act is done. In the latter case it is evidently the intention of the statute that the act should be prohibited.⁶

Objects of statutory prohibition We need not discuss here in any detail the various statutes by which certain contracts are prohibited or penalized. They relate for the most part to the security of the revenue, to the protection of the public in dealing with certain articles of commerce or in dealing with certain classes of traders, to the regulation of the conduct of certain kinds of business, and to the general control by the state of life in an industrialized and complex society.

¹ *Langton v. Hughes* (1813), 1 M. & S. 593, per Lord Ellenborough C.J. at p. 596; *Bostel Bros., Ltd. v. Hurlock*, [1949] 1 K.B. 74.

² 45 & 46 Vict., c. 58.

³ 14 & 15 Geo. VI, c. 48.

⁴ 8 & 9 Vict., c. 109.

⁵ *Victorian Daylesford Syndicate v. Dott*, [1905] 2 Ch. 624; *Anderson v. Daniel*, [1924] 1 K.B. 138.

⁶ *Melliss v. Shirley and Freemantle Local Board of Health* (1885), 16 Q.B.D. 446.

There is, however, a kind of contract which has been the frequent subject of legislation, and which from its peculiar character calls for analysis as well as for historical treatment. This is the wager.

Wagering Contracts

A wager consists in a promise to give money or money's ^{Wagers} worth upon the determination or ascertainment of an uncertain event. As Hawkins J. defined it in *Carlill v. Carbolic Smoke Ball Co.*:¹

A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

There must therefore be mutual chances of gain and loss. But it is to be observed that the event may be uncertain, not only because it is a future event, but because it is not yet ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which is over, if the parties do not know in whose favour it has gone. The uncertainty then resides in the minds of the parties, and the subject of the wager may be said to be the accuracy of each man's judgment rather than the determination of a particular event.

The parties must contemplate the determination of the uncertain event as the sole condition of their contract. For example, if *A* contracts to sell goods to *B*, delivery to be made in three months time, and the price to be the market price at the date of delivery, it may be said that *A* stands to lose or gain upon a future event, which is uncertain, that is to say, according as the market rises or falls.² But this element of chance is merely an incident in the larger transaction of a contract for

¹ [1892] 2 Q.B. 484, at p. 490, affirmed [1893] 1 Q.B. 256; *Weddle Beck & Co. v. Hackett*, [1929] 1 K.B. 321.

² *Ironmonger & Co. v. Dyne* (1928), 44 T.L.R. 497.

the sale of goods on certain terms; it does not convert that transaction into a wagering contract. The object of the wager is to make a gain purely as the result of the decision of an uncertain event. One party backs his knowledge, skill, or luck against that of the other, and in a true wager this is the whole transaction.

We must therefore distinguish a wager from certain other transactions in which there may be chances of gain and loss to the parties depending upon the determination of an uncertain event, but in which these chances are merely incidental to some other object which the parties have in view.

Distin-
guished
from con-
tracts of
insurance

Contracts of insurance bear a certain superficial resemblance to wagering contracts, but they are really transactions of a different character, and in the definition of a wager cited above from Hawkins J., they are excluded by the provision that the parties have no interest in the contract other than that which they create by the bet. If *A* insures his cargo with *B*, an underwriter, that is to say, if he agrees with *B* that in consideration of his paying a premium of £50, *B* will pay him £5,000 if the cargo is lost by certain specified perils, *A* cannot, except by straining the use of words, be said to bet against the safety of his own cargo.¹ His object is to preserve himself from a financial loss if his property perishes, and not that he should gain and *B* lose if an uncertain event turns out in a particular way. Such a transaction is quite different from that of backing a horse, even one's own horse, to win the Derby, or even from the transaction of betting against one's own horse winning, for the proprietary interest of the owner in his horse does not enter into the transaction in either of these cases. If we seek an analogy to a contract of marine insurance in the sphere of sport, we should find it rather in a point-to-point race, but this would not be a wager.

Similarly if *A* insures his life by a policy involving the payment of premiums during his whole life, he cannot, without absurdity, be said to back himself for a short life; what he does do is to buy a certain future provision for his dependants at a price which will be fixed according to the number of years he lives. No doubt, if he has a long life, the transaction will prove financially unprofitable, but almost any commercial transaction may involve chances of profit and loss.

A genuine insurance transaction, therefore, is not a wagering contract, though a transaction purporting to be one of insurance may sometimes turn out to be nothing but a wager. This abuse

¹ *Wilson v. Jones* (1867), L.R. 2 Ex. 139, at pp. 141, 150.

has been dealt with by the legislature, which makes the existence or non-existence of an 'insurable interest' the distinction between a genuine insurance transaction and a wager. The Marine Insurance Act, 1906,¹ provides that a contract of marine insurance is to be deemed to be a gaming or wagering contract if the insured has no 'interest', actual or prospective, in the adventure, or if the policy contains words which make proof of interest unnecessary. Also an Act of 1774² deals with insurance generally (marine insurance excepted), and forbids insurances on the lives of any persons or on any events whatsoever in which the person effecting the insurance has no interest.³ This Act further requires that the names of the persons interested should be inserted in the policy, and provides that no sum greater than the interest of the insured at the time of insurance should be recovered by him.

Stock Exchange transactions are another form of business transaction which easily lend themselves to mere wagering contracts.⁴ The law cannot be said to frown upon speculation in stocks and shares as such, but if a transaction is no more than 'an agreement to pay differences', that is to say, if the parties do not intend a real transaction by the purchase and delivery of actual stocks and shares, but only that one shall receive from the other the difference between the contract price of a particular security and its market price on the settling day, they are doing no more than bet on the price of the security at a future date. If a transaction is found as a fact to be essentially an agreement to pay differences, a term to the effect that either party may at his option require completion of the purchase will not be enough to alter its character. Such a term has been said to be inserted only 'to cloak the fact that it was a gambling transaction, and to enable the parties to sue one another for gambling debts'.⁵

We may leave here the analysis of a wager, and look at the law respecting wagering contracts.

(a) *Common law as to wagers*

At common law all wagers were enforceable, and, until the latter part of the eighteenth century, were only discouraged by law

¹ 6 Edw. VII, c. 41, s. 4.

² Life Assurances Act, 1774 (14 Geo. III, c. 48).

³ *Macaura v. Northern Insurance Co., Ltd.*, [1925] A.C. 619.

⁴ *Thacker v. Hardy* (1878), 4 Q.B.D. 685.

⁵ *Universal Stock Exchange v. Strachan*, [1896] A.C. 166, at p. 173.

some trifling difficulties of pleading.¹ Thus in 1771 Lord Mansfield heard without protest an action on a wager made at Newmarket by which two young men agreed 'to run their fathers (to use the phrase of that place) each against the other'; that is, to bet on the duration of their fathers' lives.² It so happened that the father of one was (unknown to either) already dead, and the arguments in the case were solely concerned with the question whether a term was to be implied into the contract analogous to the 'lost or not lost' of a marine insurance policy.

But as the Courts found that frivolous or indecent matters were brought before them for decision, rules came to be established that a wager was not enforceable if it could only be proved by evidence which was indecent or was calculated to injure or pain a third person, or, as a matter of public policy, that any wager which tempted a man to offend against the law was illegal. Strange and even ludicrous results followed from these efforts of the Courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be a contract which the Courts would not enforce, as tending, on the one side, to weaken the patriotism of Englishmen, on the other, to encourage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign.³ But it is evident that the substantial motive pressing upon the judges was 'the inconveniences of countenancing idle wagers in courts of justice', the feeling that 'it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to'.⁴

(b) *Gaming wagers*

Acts of 1664 and 1710 The legislature had, however, dealt with certain aspects of wagering contracts. It was enacted by an Act of 1664,⁵ now repealed, that any sum exceeding £100 lost in playing at games or pastimes, or in betting on the players, should be irrecoverable, and that all forms of security given for money so lost should be void. The law was carried a stage further by an Act of 1710,⁶ whereby securities of every kind, whether given for money lost in playing at any game, or betting on the players, or for the repayment of money knowingly lent for the purpose

¹ *Jackson v. Colegrave* (1694), Carthew 338.

² *March v. Pigot* (1771), 5 Burr. 2802.

³ *Gilbert v. Sykes* (1812), 16 East 150.

⁴ *Ibid.*, per Bayley J. at p. 162.

⁵ 16 Car. II, c. 7.

⁶ Gaming Act, 1710 (9 Anne, c. 19).

of gaming or betting were rendered wholly void, frustrate, and of no effect.

It will be observed that these two Acts only dealt with wagers on games and pastimes (which includes horse-racing), and did not affect wagers of other kinds, such as a wager on the result of a contested election. It will be seen hereafter that the distinction is still of importance.¹

Also cases of hardship resulted from the working of the 1710 Act. Securities (for example, a cheque), might be purchased from the holders of them by persons ignorant of their origin. These persons, when they sought to enforce them against the giver of the security, discovered, too late, that they had paid value for an instrument which was by statute wholly void as against the party losing at play. The Gaming Act, 1835, section 1,² was therefore passed, and this enacted that securities which would have been void under the 1710 Act should henceforth be deemed to have been made, drawn, or accepted *for an illegal consideration*. The effect of this is that the holder of an instrument given as security for a gaming debt may nevertheless enforce it, even after proof of its illegal inception, if he is able to show that he gave value for it and was ignorant of its origin: in other words—that he is a *bona fide* holder for value.

Act of
1835

(c) *The Gaming Act, 1845*

The next step was to make wagers of all kinds void, this was done by the Gaming Act, 1845, section 18,³ which enacts:

Gaming
Act, 1845,
s. 18

All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

The section, it will be observed, has three branches. The first makes all wagering contracts null and void. There is no difficulty about this. If *A* makes a bet with *B* on the length of St. Paul's Cathedral, and wins, he cannot sue *B* for the amount; the contract cannot be enforced by him. The second branch prevents any action being brought to recover any money or valuable thing alleged to be won on any wager. At

All wager-
ing con-
tracts 'null
and void'

¹ *Woolf v. Hamilton*, [1898] 2 Q.B. 337; *infra*, p. 285.

² 5 & 6 Will. IV, c. 41.

³ 8 & 9 Vict., c. 109.

Supple- first sight, it might seem that it was tautologous and merely
mentary restated in procedural terms a declaration of substantive law
promises already contained in the first branch. But this is not the case.
and coven-
ants

In *Hill v. William Hill (Park Lane), Ltd.*,¹ this point was considered by the House of Lords:

The defendant, a racehorse owner, had failed to honour betting debts contracted with the plaintiffs, a firm of bookmakers. They reported his default to the committee of Tattersalls, which acts as a sort of court of honour for bets on horse racing. The committee held an inquiry and ordered the defendant to pay the debts by instalments, but he failed to comply with the terms of the order. If the plaintiffs had reported this non-compliance to the Stewards of the Jockey Club, the defendant would have been posted as a defaulter and warned off the turf. They agreed, however, not to do this in consideration of his giving them a post-dated cheque for part of the amount due and promising to pay the balance by instalments. The cheque was dishonoured and the instalments were not paid.

In an action brought to recover the money promised to them, the plaintiffs pointed out that they were not suing on the contract of wager (which was void under the 1845 Act) but on a collateral and later contract by which the defendant promised to pay in consideration of their not reporting him to the Jockey Club. This, they argued, was not an agreement 'by way of gaming or wagering', the promise being a promise to pay money which, though equal to the amount of the bet, was not in fact the bet, but compensation for its non-payment. It was caught neither by the first (substantive) branch of section 18, nor by the second (procedural) branch. It was a distinct and enforceable contract.

The House of Lords, by a majority of four to three, refused to accept this contention. They held that the action was brought to recover a sum of money 'alleged to be won on any wager', and so was caught by the wider language of the second or procedural part.

The purpose of this part of s. 18 [said Lord Normand²] is not to strike a second and an unnecessary blow at contracts and agreements already stricken with nullity, but to strike at any suit for recovering money or valuables won by wagering. The language is appropriate for that purpose and it is a purpose which is a logical sequel and reinforcement of the first branch of the section. The legislature cannot have been unmindful that a provision making gaming and wagering contracts and

¹ [1949] A.C. 530, overruling the earlier decision of the Court of Appeal in *Hyams v. Stuart-King*, [1908] 2 K.B. 696.

² At p. 565.

agreements null and void might be rendered nugatory by additional promises or covenants given or entered into for security or in satisfaction of money lost by gaming or wagering. The preamble to the Act of 1845 shows that such supplementary promises and covenants were familiar to Parliament.

The effect of this decision is, then, to strike down all fresh promises to pay debts arising out of a wagering contract, and also probably any promise supplementary to such a contract, even though it does not specifically refer to the money lost.¹

The third branch of section 18 concerns the situation where the parties deposit money with a stakeholder to abide the event of a wager. In such a case the winner cannot sue to recover his winnings.² But the construction which has been put upon this part of section 18 is that it does not preclude either party from recovering his own deposit from the stakeholder until it has been paid over to the winner. In *Diggle v. Higgs*:³

Stake-
holders

D. and S. agreed together to compete in a walking match. They both deposited £200 with a third party H., each betting on himself to win. S. was adjudged the winner, but D. claimed to recover his stake from H.

It was held that he could do so, the money having not yet been paid over.

The section, however, contains a proviso:

Proviso

Provided always that the enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise.

Prizes in any lawful and genuine competition can therefore be recovered.

(d) Securities given

The Act of 1845 did not affect the distinction established by the earlier Acts between wagers on games and pastimes and other wagers—so far as concerns securities given in respect of each class of wager. Securities given in respect of wagers on games and pastimes, or in respect of money lent for betting on such games or pastimes, are still (by reason of the Act of

Securities
given in
respect
of wagers
on games
and pas-
times

¹ Thus a promise to perform some quite different obligation in consideration that the wagering debt is not disclosed would also be struck down.

² *Varney v. Hickman* (1847), 5 C.B. 271.

³ (1877), 2 Ex. D. 422; *Burge v. Ashley & Smith, Ltd.*, [1900] 1 Q.B. 744 (on the effect of the 1892 Act, *infra*). The stakeholder will even be liable if he disregards the demand: *Hampden v. Walsh* (1876), 1 Q.B.D. 189.

1835) deemed to be given upon an illegal consideration. It is for the holder of the security to prove that, subsequent to the illegality, value has in good faith been given.¹

and non-
gaming
wagers But since the 1845 Act, securities given in respect of non-gaming wagers are affected by the fact that the transaction in respect of which they were given is said by the statute to be null and void. Here, however, the defect is not that they are deemed to have been given for an *illegal* consideration, but that they have been given for no consideration at all. In such a case, the rules which govern the transfer and enforcement of negotiable instruments (such as cheques) provide that, if consideration has at some time during the history of the instrument been given, it is enforceable by the holder thereof.² Moreover it is for the original drawer of the cheque to *disprove* the giving of such consideration, for the holder is presumed to be a holder in due course unless the contrary is proved.

contrasted To illustrate the distinction between gaming and non-gaming securities, and the burden of proof in either case, let us take the following example:

Suppose that *A* makes a bet with *B* on the result of the Cheltenham Gold Cup, and loses. He gives *B* a cheque for £100. *B* indorses the cheque in favour of *C*, a trader, in return for a television set.

Since the wager was one on a game or pastime, namely, horse-racing, the cheque is deemed to have been given for illegal consideration. It is for *C* to prove that consideration has at some time been given, either by himself or by some other holder, without notice of the circumstances which gave rise to the illegality. But had the same bet been made, for instance, on the height of Blackpool Tower, then this would have been a non-gaming wager. The burden of proof would have been upon *A* to show that value had not been given. Knowledge of the circumstances of the wager would this time be immaterial.

(e) *Agreements in respect of wagers*

Agreements arising out of wagers It remained to deal with certain agreements arising out of wagers or made in contemplation of them. Wagers being only void, no taint of illegality attached to a transaction whereby one man employed another to make bets for him; the ordinary rules which govern the relation of employer and employed applied in such a case.

¹ Bills of Exchange Act (45 & 46 Vict., c. 61), ss. 29, 30; *Tatam v. Haslar* (1889), 23 Q.B.D. 345; *Woolf v. Hamilton*, [1898] 2 Q.B. 337.

² Viz. *infra*, pp. 327, 386.

The Gaming Act, 1892,¹ altered the law in this respect:

Gaming
Act, 1892

Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109,² or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

A man cannot now recover commission or reward promised to him for making or for paying bets; nor can he recover money paid in discharge of the bets of another. Whether he is a betting commissioner who pays the bets which he has been employed to make and, if lost, to pay;³ or whether, on request, he settles the accounts of a friend who has lost money at a race-meeting,⁴ he cannot successfully sue for money so paid. A loan of money, therefore, made for the purpose of paying a wagering debt, is irrecoverable if it has been paid direct to the winner, for the lender has paid it 'under or in respect of' a contract avoided by the Act of 1845.⁵ Nor again can it be recovered if it is a term in the contract that the money lent should be used for the payment of such a debt.⁶

Loans to
pay wager-
ing debts

But in *Re O'Shea*⁷ the Court of Appeal held that money knowingly lent to pay wagering debts can be recovered provided that it is not paid direct to the winner, but remains at *the free disposition of the borrower* to use as he thinks fit. In such a case, the money is not paid 'under or in respect of' a contract rendered null and void by the Gaming Act, 1845; accordingly it does not fall under the Act of 1892, and may still be recovered. This leads to the somewhat anomalous result that if *A* lends money to *B* for *B* to pay wagering debts, *A* can recover; whereas if *A* pays the money direct to the winner on *B*'s behalf, recovery is barred.

Money knowingly lent for the purpose of wagering also raises some nice points of law. Probably if it is at the free disposition of the borrower it is similarly outside the Act of 1892; it is not money paid 'under or in respect of' a contract made void by the Act of 1845. But here we have also to ask whether the Acts of 1710 and 1835 make such a loan irre-

Loans for
wagering

¹ 55 & 56 Vict., c. 9, s. 1.

² The Gaming Act, 1845.

³ *Saffery v. Mayer*, [1901] 1 K.B. 11.

⁴ *Woolf v. Freeman*, [1937] 1 All E.R. 178.

⁵ *Tatam v. Reeve*, [1893] 1 Q.B. 44.

⁶ *Macdonald v. Green*, [1951] 1 K.B. 594.

⁷ [1911] 2 K.B. 981.

coverable. It will be remembered that these Acts only deal with and gaming *gaming* wagers, and strictly are only concerned with securities given for the repayment of money knowingly lent for the purpose of making such wagers. In *Carlton Hall Club, Ltd. v. Laurence*,¹ however, their effect was said to be rather wider:

The plaintiffs were the proprietors of a social club. They supplied to members wishing to play games for money 'chips' in return for cheques made out by those members. The defendant bought some £28 worth of chips, giving the plaintiffs a cheque for that amount. The cheque was dishonoured. It was clear that the cheque given as security for the repayment of money lent by the plaintiffs for the purpose of gaming was void under the 1710 Act, and that it must be taken to have been given for an illegal consideration under the Act of 1835. No action could therefore be maintained on the cheque. But the plaintiffs claimed that they could recover on the contract of loan which would not be affected by the enactments referred to. It was argued that a loan of money for the purpose of gaming, as distinct from the security for the loan, was not void but was valid and enforceable. The Divisional Court rejected this contention. They held that the Acts of 1710 and 1835 rendered illegal not only the security but also the consideration. The loan was therefore irrecoverable. In this case, however, the money lent could clearly only have been used for one purpose, and it is by no means certain that the result would have been the same had it been at the free disposition of the borrower to use as he thought fit.

Illegal games Certain games, such as hazard and roulette, are made illegal by statute, and therefore money lent for playing at such games cannot be recovered.² This is a rule of the common law. But it is well established that money won by playing, or lent for the purposes of playing, a game which, although unlawful in England, is lawful in the place where it was played, can be recovered in the English Courts provided that it could have been recovered in the place where it was lost or won:³

Suppose that, while in France, *A* lends *B* money in order to enable him to play at roulette. Such a loan is valid and recoverable in French law. *A* can recover from *B* in the English courts.

¹ [1929] 2 K.B. 153.

² *McKinnell v. Robinson* (1838), 3 M. & W. 434; *Jenks v. Turpin* (1884), 13 Q.B.D. 505. Games of chance are unlawful if played in a place habitually kept for gaming (Gaming Act, 1845, s. 1), but a game which involves skill alone is lawful. Bridge, it seems, is a game of skill: *Woolf v. Freeman*, [1937] 1 All E.R. 178; *aliter* poker: *Dulton v. Adelphi Club, Ltd.*, [1938] 4 All E.R. 556.

³ *Saxby v. Fulton*, [1909] 2 K.B. 208.

On the other hand, if the country with which the transaction has most connexion is England, then it is governed by English law and the money cannot be recovered. Thus if, in the above example, *B* gives to *A* as security a cheque drawn on an English bank, *A* cannot sue *B* on the cheque as it is governed by English law.¹ He can, however, disregard the security and sue on the contract of loan.²

(f) *Principal and agent*

If one person employs another to make bets for him, the person making the bet (the agent) can bring no action if his principal fails to pay the money due. This was not the rule at common law,³ but the contract is clearly caught by the Gaming Act, 1892.⁴ Also if the agent fails to place the bet, no action can be brought for breach of the contract of agency, or to recover the sums which would have been won had the agent faithfully carried out his instructions.⁵ It has been held, however, that an agent who receives the winnings cannot keep them. This is money received on behalf of another under a contract of agency, and, it is said, is not money paid 'under or in respect of' a contract rendered void by the 1845 Act; it is thus outside the Act of 1892.⁶

The Gaming Act, 1845, repealed the Act of Charles II (1664) and substantially that of 1710 as well, so that, apart from acts forbidding lotteries and certain games, and acts regulating insurance, we now have three statutes relating to wagers—the Gaming Act, 1835, as to securities given in respect of gaming wagers; the Gaming Act, 1845, as to wagers in general; the Gaming Act, 1892, as to certain transactions closely connected with wagers. The interaction of these enactments has produced a law which is both complicated and artificial but which seems to have succeeded in its primary aim of keeping wagering contracts from being litigated upon in the Courts.

Contracts Illegal or Void at Common Law

There are a number of contracts which cannot be enforced even though they are not forbidden by any positive enactment.

¹ *Moultis v. Owen*, [1907] 1 K.B. 746.

² *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927), 43 T.L.R. 278.

³ *Read v. Anderson* (1882), 10 Q.B.D. 100, affirmed (1884), 13 Q.B.D. 779.

⁴ *Law v. Dearnley*, [1950] 1 K.B. 400.

⁵ *Cohen v. Kittell* (1889), 22 Q.B.D. 180.

⁶ *De Mattos v. Benjamin* (1894), 63 L.J.Q.B. 248.

(a) *Agreements to commit a crime or civil wrong*

¹ Agreements to commit a crime. It is plain that the Courts will not enforce an agreement to commit an act which is criminal at common law or by statute. So effective is this prohibition that a man is not allowed to claim the benefit of a contract which has only become possible of performance by the criminal act of one of the contracting parties. Thus a life insurance policy cannot be enforced when the assured feloniously commits suicide, for the law will not aid either a criminal or his representatives to reap the fruits of a crime. In *Beresford v. Royal Insurance Co., Ltd.*:¹

B. insured his life with the defendant company for £50,000. A few minutes before the policy was due to lapse, he committed suicide. The policy contained a term avoiding it in the event of suicide within a year of its commencement, but the suicide occurred after the policy had run for some years.

Nevertheless the House of Lords held that the insurance company was not bound to pay anything to the deceased's executors, as they should not obtain any benefit from the assured's criminal act. *A fortiori* a person who insures another's life and then murders him for the insurance money cannot recover.²

or civil wrong. Nor again will the Courts enforce an agreement to commit a tort. An agreement to commit an assault has therefore been held to be void, as in *Allen v. Rescous*,³ where one of the parties undertook to beat a man. So, too, has an agreement involving the publication of a libel,⁴ deceit,⁵ or the perpetration of a fraud.⁶ In *Mallalieu v. Hodgson*:⁷

A debtor made a composition with his creditors of 6s. 8d. in the pound. He entered into a separate and secret contract with the plaintiff to pay him a part of his debt in full.

This was held to be a fraud on the other creditors, each of whom had promised to forgo a portion of his debt in consideration that the others would forgo theirs in like proportion. 'Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void.'⁸ On the same ground an agreement by

¹ [1938] A.C. 586. Cf. *St. John Shipping Corporation v. Joseph Rank, Ltd.*, [1957] 1 Q.B. 267.

² *Prince of Wales Association Co. v. Palmer* (1859), 25 Beav. 605.

³ (1678), 2 Lev. 174.

⁴ *Clay v. Yates* (1856), 1 H. & N. 73.

⁵ *Brown Jenkinson & Co., Ltd. v. Percy Dalton (London), Ltd.*, [1957] 2 Q.B. 621.

⁶ *Willis v. Baldwin* (1780), 2 Doug. K.B. 450.

⁷ (1851), 16 Q.B. 689.

⁸ *Ibid.*, per Erle J. at p. 711.

the promoters of a company to defraud prospective shareholders,¹ or to induce the public to believe that there was a real market for shares,² has been held to be fraudulent and unenforceable.

One of the most common types of illegal agreement in these days of heavy taxation and expense accounts is one to defraud the revenue, whether that of the central or local government. In *Alexander v. Rayson*:³

Agreements to defraud the revenue

The plaintiff let a flat to the defendant at a rent of £1,200 a year. The transaction was effected by two documents: (1) a lease of the flat at a rent of £450 p.a., covering certain services to be rendered by the lessor, and (2) an agreement to render services (which were substantially the same) in consideration of an extra £750 p.a. A dispute having arisen, the defendant declined to pay an instalment due under the agreement. When sued by the plaintiff, he pleaded that the object of the two documents was that only the lease was to be disclosed to the local authority in order to deceive them as to the true rateable value of the premises.

The Court of Appeal held that, if the documents were to be used for this fraudulent purpose, the plaintiff was not entitled to the assistance of a Court of Law in enforcing either the lease or the agreement.

We may perhaps also classify under this head certain contracts which the law discourages as tending to enable persons to commit crimes or torts with impunity. These are agreements to indemnify a person against the consequences of his criminal or tortious acts. Although it has been held that a motorist may recover under a policy of insurance against third party risks even if the loss which he seeks to recover was incurred by his own gross or criminal negligence,⁴ it seems that a contract to indemnify a person against the consequences of an intentional act cannot be enforced. In *W. H. Smith & Son v. Clinton*,⁵ for example:

Contracts of indemnity

¹ *Begbie v. Phosphate Sewage Co.* (1875), L.R. 10 Q.B. 491, affirmed (1875), 1 Q.B.D. 679.

² *Scott v. Brown & Co.*, [1892] 2 Q.B. 724.

³ [1936] 1 K.B. 169; *Napier v. National Business Agency, Ltd.*, [1951] 2 All E.R. 264.

⁴ *Tinline v. White Cross Insurance Co., Ltd.*, [1921] 3 K.B. 327; *James v. British General Insurance Co.*, [1927] 2 K.B. 311.

⁵ (1908), 99 L.T. 840. The Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. V, c. 30), s. 6, grants a right of contribution between co-tortfeasors but does not give any fresh right of indemnity in relation to contracts which would be unenforceable if the section had not been passed. Also the Defamation Act, 1952 (15 & 16 Geo. VI & Eliz. II, c. 66), s. 11, allows a certain validity to contracts of indemnity where defamatory matter is concerned.

The defendants contracted to indemnify the plaintiffs, a firm of printers and publishers, against the consequences of any libel which might appear in their paper *Vanity Fair*. The plaintiffs were forced to pay damages for a statement published by them which they knew to be libellous.

It was held that they could not enforce the contract of indemnity. Further, a solicitor who had entered into a 'champerous' agreement, though without realizing that he was committing a criminal offence, could not claim to be indemnified under a policy which, as he alleged, insured him against loss arising from the commission of such an act.¹

(b) *Agreements to do that which it is the policy of the law to prevent*

Public policy The policy of the law, or public policy as it is usually called, is a phrase of common use in assessing the validity of contracts.

General application

Its history is obscure; it is most likely that agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the Courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, as is shown by the cases already quoted,² but it does not seem that the doctrine of public policy is wholly attributable to this source. Whatever may have been its origin, it was applied very frequently, and not always with the happiest results, during the latter part of the eighteenth, and the commencement of the nineteenth, century. Its boundaries were so vague and its scope so ill-defined that voices began to be raised against any further extension of the doctrine. 'I, for one', said Burrough J. in 1824,³ 'protest . . . against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you.' Subsequently, the judges, while maintaining their duty to consider the public advantage, have tended to limit the sphere within which this duty may be exercised. Jessel M.R., in 1875, stated a principle which still remains valid in such cases when he said:⁴

¹ *Haseldine v. Hosken*, [1933] 1 K.B. 822. See also *Brown Jenkinson & Co., Ltd. v. Percy Dalton (London), Ltd.*, [1957] 2 Q.B. 621.

² *Supra*, p. 282. ³ *Richardson v. Mellish* (1824), 2 Bing. 229, at p. 252.

⁴ *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, at p. 465. This statement may, however, be considered to be the high watermark of the theory of freedom of contract. We have no general theory of 'abuse of contract' (viz. *supra*, p. 164), and it is arguable that the judges might, with benefit, venture a few more rides abroad on the 'unruly horse'. Cf. Asquith L.J. in *Monkland v. Jack Barclay, Ltd.*, [1951] 2 K.B. 252, at p. 265.

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

It is in reconciling this freedom of contract with other public interests that the difficulty arises.

We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said extra-judicially:¹ 'Public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. . . . If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally.'

We may arrange the contracts which the Courts will not enforce because contrary to public policy under certain heads.

*Agreements which Injure the State in its
Relations with Other States*

These fall under two heads, friendly dealings with a hostile state, and hostile dealings towards a friendly state.

Contracts with alien enemies have already been discussed.² Contracts with an alien enemy
It is unlawful to enter into such a contract or to perform during war a contract made with an alien enemy before war broke out. And it has been laid down that a contract which in terms provides for the suspension of all rights and obligations arising under it while war continues may yet be held to be void on grounds of public policy as tending, merely by its continued existence, to promote the economic interests of the enemy state or to prejudice those of this country.³

An agreement which contemplates action hostile to a friendly or hostile to a friendly state state is unlawful and cannot be enforced. So the Courts will afford no assistance, for example, to persons 'who set about to state

¹ *Legal Essays and Addresses*, iii. 76, 78.

² *Supra*, p. 167.

³ *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260, at p. 269.

raise loans for subjects of a friendly state to enable them to prosecute a war against their sovereign'.¹ It is also contrary to public policy to allow the enforcement in English Courts of agreements designed to break the law of a friendly state. 'This country', it has been said,² 'should not assist or sanction the breach of the laws of other independent states.' Thus the Court of Appeal has refused to entertain an action arising out of certain transactions which had for their object the importation of whisky contrary to the prohibition laws of the United States.³

But this does not mean to say that the Court must necessarily refuse to enforce a contract merely because its performance will involve a foreign defendant in a breach of his own law.⁴ If the foreign law is repugnant to English conceptions of liberty or freedom of action—if, for example, it penalizes certain sections of the population on religious or racial grounds,⁵ or if it imposes a contractual incapacity which is foreign to the ideas of English law,⁶ it will not be enforced here. The same principle is said to apply to the penal, political, or revenue laws of other countries. 'No country', said Lord Mansfield,⁷ 'ever takes notice of the revenue laws of another.' But this statement is too wide; the Court is not prepared to disregard them altogether. If two people knowingly contract to *break* such a law, they cannot expect the Court to assist them. In *Regazzoni v. K. C. Sethia (1944), Ltd.*:⁸

The defendants agreed to sell and deliver to the plaintiff at Genoa in Italy a quantity of jute bags to be shipped from India. At that time the government of India, because of a dispute with the South African government over the treatment of Indian nationals in that country, had prohibited the direct export of jute to South Africa, and also imposed penalties on any indirect shipments. Both the defendants and the plaintiff knew that the jute bags were to be shipped to South Africa in violation of the Indian prohibition. The bags were not delivered and the plaintiff brought an action for non-delivery.

¹ *De Wütz v. Hendricks* (1824), 2 Bing. 314, per Best C.J. at p. 315.

² *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287, per Scrutton L.J. at p. 304.

³ *Foster v. Driscoll*, [1929] 1 K.B. 470.

⁴ *Kleinwort Sons & Co. v. Ungarische Baumwolle Aktiengesellschaft*, [1939] 2 K.B. 678; *British Nylon Spinners, Ltd. v. I.C.I., Ltd.*, [1955] Ch. 37.

⁵ *Sommersett's Case* (1772), 20 St. Tr. 1.

⁶ *In re Selot's Trusts*, [1902] 1 Ch. 488.

⁷ *Holman v. Johnson* (1775), 1 Cowp. 341, at p. 343.

⁸ [1958] A.C. 301, where the law broken was not that of the *lex loci solutionis*.

The House of Lords held that the contract, having for its object breach of the law of a friendly state, could not be enforced in this country, even though the law might be classed as a political law. The plaintiff accordingly failed.

Agreements Tending to Injure the Public Service

The public has an interest in the proper performance of their duty by public servants, and is entitled to be served by the fittest persons procurable. The Courts hold contracts to be illegal which have for their object the sale of public offices or the assignment of the salaries of such offices.

The law will not uphold a contract whereby a person agreed to use his influence or position for the purpose of securing a title, contract, or some other benefit from the government;¹ or a disposition of property made upon the condition that the holder should never enter the naval or military service of the Crown;² or an agreement whereby a member of Parliament in consideration of a salary paid to him by a political association agreed to vote on every subject in accordance with the directions of the association;³ or an agreement whereby a man made a donation to a charity in consideration of a promise to secure him a knighthood.⁴ The public has a right to demand that public officials shall not be induced merely by considerations of personal gain to act in a manner other than that which the public interest demands, and that no one shall enter or refrain from entering the public service for the same reason.

The rule against the assignment of the salary of a public office is based on a somewhat different principle. In *Wells v. Foster*,⁵ Lord Abinger explained it on the ground that 'it is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty'.⁶ And in the same case, Parke B. laid down the limits within which a public pension is assignable:⁷

A man may always assign a pension given to him entirely as a compensation for past services, . . . but where a pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service

¹ *Montefiore v. Munday Motor Co.*, [1918] 2 K.B. 241.

² *Re Beard, Beard v. Hall*, [1908] 1 Ch. 383.

³ *Osborne v. Amalgamated Society of Railway Servants*, [1910] A.C. 87.

⁴ *Parkinson v. College of Ambulance, Ltd.*, [1925] 2 K.B. 1.

⁵ (1841), 8 M. & W. 149.

⁶ At p. 151.

⁷ At p. 152.

which the party has already performed, it is against the policy of the law that it should be assignable.

Thus it seems that the prohibition does not apply where the duties attached to the office have ceased.

Agreements which Tend to Pervert the Course of Justice

Stifling
criminal
proceedings

These most commonly appear in the form of agreements to stifle prosecutions, as to which Lord Westbury said,¹ 'You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself.'

except
where civil
and
criminal
remedies
co-exist

An exception to this rule is found in cases where the civil and criminal remedies co-exist; a compromise of a prosecution is then permissible. The exception and its limits are thus stated in *Keir v. Leeman*:²

We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

Promises
of secrecy

A contract not to disclose the fact that a crime has been committed is not necessarily against public policy; for example, the Court of Appeal has pointed out that 'it may well be permissible for a person against whom frauds have been and are intended to be committed to give a promise of secrecy in order to obtain information relating to them which will enable him, by taking steps himself, to prevent the commission of future frauds'.³ But such a contract is void if its effect is not merely to enable the party to whom the information is given to protect himself, but to preclude him from disclosing information as to frauds committed or contemplated against others to whom such information would be of use in preventing the commission of such frauds.

Another example of illegal agreements of this class is an

¹ *Williams v. Bayley* (1866), L.R. 1 H.L. 200, at p. 220.

² (1844) 6 Q.B. 308, *per* Lord Denman C.J. at p. 320, affirmed (1846), 9 Q.B. 371; *Windhill Local Board v. Vint* (1890), 45 Ch. D. 351. But there is some difficulty in relation to the rule as to prosecutions for felony laid down in *Smith v. Selwyn*, [1914] 3 K.B. 98. See also the Larceny Act, 1916 (6 & 7 Geo. V, c. 50), s. 34.

³ *Howard v. Odhams Press, Ltd.*, [1938] 1 K.B. 1, *per* Greene L.J. at p. 42.

indemnity given to one who has gone bail for an accused person, whether such indemnity be given by the prisoner himself,¹ or by a third person on his behalf.²

Agreements which Tend to Abuse the Legal Process

Under the names of maintenance and champerty two objects of agreement are described which the law regards as unlawful. They tend to encourage litigation which is not *bona fide* but speculative. It is not thought right that one should buy an interest in another's quarrel, or should incite another to litigation by offers of assistance for which he expects to be paid.

Maintenance has been defined to be 'when a man maintains a suit or quarrel to the disturbance or hindrance of right'.

Champerty is where 'he who maintains another is to have by agreement part of the land, or debt, in suit'.³

Maintenance is a civil wrong which does not often figure in the law of contract. It is thus defined by Lord Haldane in *Neville v. London Express Newspaper*,⁴ which is the leading case on this topic: Maintenance

It is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence.

The 'legal interest' which is sufficient may, however, be of a general nature, as, for example, where a national Angler's Society provides funds for an action by a riparian owner against a company alleged to be polluting a particular river.⁵

Champerty, or the maintenance of a quarrel for a share of the proceeds, is a species of maintenance, and it has been repeatedly declared that its existence will avoid any agreement made in contemplation of it. It is not unlawful to supply information which will enable property to be recovered, in consideration of receiving a part of the property when recovered;⁶ but if the person giving such information is to assist in the recovery by procuring evidence or other means, the arrangement is contrary to the policy of the law and void.⁷ Champerty
The question whether the purchase of a right of action already

¹ *Herman v. Feuchner* (1885), 15 Q.B.D. 561.

² *Consolidated Exploration and Finance Co. v. Musgrave*, [1900] 1 Ch. 37.

³ Com. Dig., vol. 5, p. 22.

⁴ [1919] A.C. 368, at p. 390.

⁵ *Martell v. Consett Iron Co., Ltd.*, [1955] Ch. 363.

⁶ *Rees v. De Bernardy*, [1896] 2 Ch. 437.

⁷ *Stanley v. Jones* (1831), 7 Bing. 369.

accrued is obnoxious to the rules against champerty is considered later in connexion with the general subject of assignment of choses in action.¹

Collusive divorce A further example of agreements which tend to the abuse of legal process can be found in collusive arrangements between the parties to a suit for divorce, for example, where one of the parties undertakes not to defend the petition if the petitioner will refrain from claiming financial provision by way of alimony or maintenance. Any arrangement, which savours of such collusion is void.

Agreements which are Contrary to Good Morals

Sexual immorality Although it has sometimes been said that contracts *contra bonos mores* are void, the only aspect of immorality with which Courts of Law have actually dealt is sexual immorality; and the law on this subject may be shortly stated.

A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is unlawful whether made by parol or under seal.² But a promise made in consideration of past illicit cohabitation is not made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, unenforceable if by parol.³

An agreement innocent in itself will be vitiated if intended to further an immoral purpose and known by both parties to be so intended. In *Pearce v. Brooks*:⁴

The plaintiffs, a firm of coach-builders, agreed with a prostitute to hire to her a brougham, with the knowledge that it was to be used by her in the furtherance of her immoral trade. She failed to pay the hire, and the plaintiffs brought an action to recover the money.

It was held that they could not recover. Similarly a landlord who let premises to a woman who was, to the knowledge of the landlord's agent, the kept mistress of a man who was in the habit of visiting her there, and who was expected to pay the rent, was not permitted to recover the rent reserved in the lease.⁵

Agreements which Affect the Freedom or Security of Marriage or the Due Discharge of Parental Duty

Restraint of marriage Such agreements, in so far as they restrain the freedom of marriage are discouraged on public grounds as injurious to the moral welfare of the citizen. Thus a promise by a man under

¹ *Infra*, p. 378.

² *Ayerst v. Jenkins* (1873), L.R. 16 Eq. 275.

³ *Beaumont v. Reeve* (1846), 8 Q.B. 483.

⁴ (1866), L.R. 1 Ex. 213.

⁵ *Upfill v. Wright*, [1911] 1 K.B. 506.

seal 'not to marry with any person besides Mrs. Catherine Lowe; and if I do, to pay to the said Mrs. Catherine Lowe the sum of £2,000' was held 'void, as there was no promise of marriage on either side and the agreement was purely restrictive.'¹

What are called marriage brokage contracts, or promises made upon the consideration of the procuring or bringing about a marriage, are held illegal 'not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation'.² And so an agreement to introduce a person to others of the opposite sex with a view to marriage (as in the case of a matrimonial bureau) is unlawful, although there is a choice given of a number of persons, and not an effort to bring about marriage with a particular person.³

The breach of a promise to marry after his wife's death, made by a married man to a woman who knows him to be married is not actionable.⁴ Such a contract is 'not only inconsistent with that affection which ought to subsist between married persons, but is calculated to act as a direct inducement to immorality'.⁵ But this reasoning does not hold good where the marriage is already virtually at an end. The House of Lords in *Fender v. St. John-Mildmay*⁶ realistically held, but by a bare majority, that an action would lie on a promise by a married man, against whom a decree *nisi* had been obtained, to marry a woman after his divorce had been made absolute. It was clear that affection had been irrevocably lost, and that the marriage could be lawfully celebrated so soon as the necessary period had expired.

Agreements providing for the separation of husband and wife are valid if made in prospect of an immediate separation; but it is otherwise if they contemplate a possible separation in the future, because they then give inducements to the parties not to perform their matrimonial duties, in the fulfilment of which society has an interest.⁷

For the same reason a parent cannot by contract transfer to

Agreements for separation

Parental duty

¹ *Lowe v. Peers* (1768), 4 Burr. 2225.

² *Cole v. Gibson* (1750), 1 Ves. Sen. 503, per Lord Eldon at p. 506.

³ *Hermann v. Charlesworth*, [1905] 2 K.B. 123.

⁴ But if she does not know, she can bring an action for breach: *Shaw v. Shaw*, [1954] 2 Q.B. 429.

⁵ *Wilson v. Carnley*, [1908] 1 K.B. 729, per Farwell L.J. at p. 740.

⁶ [1938] A.C. 1.

⁷ *Cartwright v. Cartwright* (1858), 3 De G. M. & G. 982.

another his or her rights and duties in respect of a child, because the law imposes such duties in respect of the infant and for its benefit.¹ In a proper case, however, an adoption order can be obtained from the Court under the Adoption Act, 1950.²

Agreements which Oust the Jurisdiction of the Courts

Ousting
jurisdiction
of Courts

An agreement which purports to oust the jurisdiction of the Courts is contrary to public policy and void. Each of the Queen's subjects has the right to have his legal position determined by the ordinary tribunals.

The most frequent application of this rule is to contracts which contain a clause that any dispute or difference between the parties is to be referred to and settled by arbitration. Such a clause is valid and binding, but it cannot deprive the parties of their right to have any point of law determined by the ordinary Courts.

Scott v.
Avery
clause

On the other hand, in the leading case of *Scott v. Avery*³ it was held that a contract which required as a condition precedent to the accrual of any cause of action that the arbitrator should have made an award is not contrary to public policy. It does not oust the jurisdiction of the Court but merely provides that the cause of action shall not be complete until the arbitration shall have been held. However, since this provision can be made to apply not only to the amount of the award, but also to the question of legal liability, it is clear that its effect is to act as a defence to any action brought before the award is made.⁴ Such a clause is common in arbitration agreements and is known as a *Scott v. Avery* clause. A similar provision known as an 'Atlantic Shipping' clause is also frequently inserted, and this provides that no claim shall arise unless it is put forward in writing and an arbitrator appointed within a limited period.⁵ Its validity rests upon the same foundation.

Another example of an agreement which ousts the jurisdiction of the Courts is one in which a wife contracts not to apply to the Courts for maintenance in return for a promise by the

¹ *Humphrys v. Polak*, [1901] 2 K.B. 385.

² 14 Geo. VI, c. 26.

³ (1855), 5 H.L.C. 811.

⁴ Under the Arbitration Act, 1950 (14 Geo. VI, c. 27), s. 25, the Court may set aside such a condition. Also under the Limitation Act, 1939 (2 & 3 Geo. VI, c. 21), s. 27 (2), a clause of this nature does not operate so as to postpone the running of any period of limitation.

⁵ *Atlantic Shipping and Trading Co. v. Dreyfus (L.) & Co.*, [1922] 2 A.C. 250.

husband that he will make her a definite allowance.¹ Such an agreement is contrary to public policy, as it restricts the right of the Court to make an appropriate award.

Agreements in Restraint of Trade

An agreement in restraint of trade is one in which a party covenants to restrict the exercise of his trade, business, or profession. Such agreements fall generally into three classes: Restraint of trade

First, an agreement between master and servant, whereby the servant covenants not to set up business on his own account on leaving his master's service or to enter into employment with a rival firm. Types of restraint

Secondly, an agreement between the buyer and seller of a business together with its goodwill, whereby the seller covenants not to carry on a business which will compete with that of the buyer.

Thirdly, an agreement between traders generally, whereby they contract to regulate their supplies or production, or to maintain the price of articles marketed by them.

The law concerning restraint of trade has changed from time to time with the changing conditions of trade, but these changes have, on the whole, been a continuous development of a general rule.

(a) History of the doctrine

The earliest cases show a disposition to avoid all contracts 'to prohibit or restrain any person to use a lawful trade at any time, or at any place', as being 'against the benefit of the Commonwealth'.² But soon it became clear that the Commonwealth would not suffer if a man who sold the goodwill of a business bound himself not to enter into immediate competition with the buyer; thus it was laid down in *Rogers v. Parry*³ in 1613 that 'a man cannot binde one, that he shall not use his trade generally . . . but for a time certain, and in a place certain, a man may well be bound, and restrained from using of his trade'. A rule thus became established that contracts in *general* restraint of trade were invalid, but that contracts in *partial* restraint, if reasonable and not contrary to the public interest, would be upheld. 'What does it signify', it was said,⁴ 'to a tradesman in London, what another does at Newcastle?' Develop-ment of law
General and partial restraints

¹ *Bennett v. Bennett*, [1952] 1 K.B. 249.

² *Colgate v. Bachelors* (1596), Cro. Eliz. 872.

³ (1613), Bulst. 136.

⁴ *Mitchel v. Reynolds* (1711), 1 Peere Wms. 181, at p. 191.

Permissible
restrictions

extended
by public
policy

But as trade expanded and the dealings of an individual ceased to be confined to the locality in which he lived, the distinction between general and partial restraints began to appear anomalous. The rule as thus expressed was inapplicable to the modern conditions of trade. In the sale of the goodwill or of a trade secret the buyer might, in earlier times, have been sufficiently protected by limited restrictions as to the place or persons with whom the seller should henceforth deal, but this is not so where an individual or a company supplies some article of commerce to the civilized world. The policy of the law in respect of restraints of trade was adapted to modern conditions in 1894 by the House of Lords in *Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Co.*¹

The defendant, Nordenfeldt, was a maker and inventor of guns and ammunition. He sold his business to the plaintiff company for £287,500 and entered into a covenant (later to be repeated in a contract of service) that he would not 'for twenty-five years engage . . . either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company', but expressly reserved the right to deal in explosives other than gunpowder, in torpedoes or submarine boats, and in metal castings or forgings. After some years Nordenfeldt entered into a business with a rival company dealing with guns and ammunition, and the plaintiffs sought an injunction to restrain him from so doing.

It is clear that the restraint entered into by Nordenfeldt was of a general, and not merely of a partial, nature, since there was no limit placed on the area to which it was to extend. Nevertheless, the House of Lords held that this did not, of itself, mean that the covenant was void. They were of the opinion that the covenant not to compete with the company 'in *any* business competing or liable to compete in any way with that for the time being carried on by the company' was unreasonable, as it attempted to protect not only the business as it was when sold, but any future activities of the company, and it was therefore void; but this clause was distinct and severable from the rest of the agreement. As for the remainder of the restraint, in so far as it protected the business actually sold, it was reasonable between the parties, because Nordenfeldt not only received a large sum of money, but also by his reservation retained scope for the exercise of his inventive and manufacturing skill. Moreover the wide area over which the business extended necessi-

¹ [1894] A.C. 535.

tated a restraint co-extensive with that area for the protection of the plaintiffs. Finally it could not be said to be contrary to the public interest since it transferred to an English company the making of guns and ammunition for foreign lands. The restraint was therefore valid.

The House of Lords, however, after considering the previous authorities, went on to express the view that the division of agreements in restraint of trade into two classes—general and partial (the former being necessarily void in all cases, the latter only if unreasonable or injurious to the public interest)—could no longer be sustained as a rule of the common law. All contracts, said Lord Macnaghten, which had for their object the restraint of trade, were *prima facie* void, but all might be justified if they were reasonable in the interests of the parties and of the public:

The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.¹

(b) *The modern law*

Lord Macnaghten's judgment in the *Nordenfeldt Case* is the foundation of all modern law on the subject, and as a result of it and later cases in which it has been elucidated we may lay down certain propositions of law:

Modern
rules as to
restraints

1. All restraints of trade, in the absence of special justifying circumstances, are contrary to public policy and therefore void.²

¹ At p. 565.

² This proposition, as Younger L.J. pointed out in *Attwood v. Lamont*, [1920] 3 K.B. 571, at pp. 585, 587, nevertheless runs counter to a number of cases decided both before and after the *Nordenfeldt Case* in which the lower Courts have held that a partial restraint was *prima facie* valid: *Mills v. Dunham*, [1891] 1 Ch. 576, at p. 586; *Haynes v. Doman*, [1899] 2 Ch. 13, at p. 30. But in *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724, the House of Lords confirmed Lord Macnaghten's assertion and it is now beyond challenge.

2. It is a question of law for the decision of the Court whether the special circumstances adduced do or do not justify the restraint; and if a restraint is not justified, the Court will, if necessary, take the point, since it relates to a matter of public policy, and the Court does not enforce agreements which are contrary to public policy.¹

3. A restraint can only be justified if it is reasonable (a) in the interests of the contracting parties, and (b) in the interests of the public.

4. The onus of showing that the restraint is reasonable between the parties rests upon the person alleging that it is so, that is to say, upon the covenantee.² The onus of showing that, notwithstanding that a covenant is reasonable as between the parties, it is nevertheless injurious to the public interest and therefore void, rests upon the party alleging it to be so; and it has been said that 'if once the Court is satisfied that the restraint is reasonable as between the parties, the onus will be no light one'.³

Reasonableness, however, as a test for the validity of a restraint, requires further elucidation.

(c) *The test of reasonableness*

**Reason-
ableness** The application of this test will depend on the answers to two questions: what is it that the covenantee is entitled to protect, and against what is he entitled to protect it?

A covenant cannot be considered reasonable unless it is designed merely to protect the legitimate proprietary interests of the covenantee. So an employer may protect his trade secrets against their revelation by an employee, and the buyer of the goodwill of a business may protect it from immediate depreciation by the competitive activities of the seller. But the law will not permit a covenant in gross, designed simply to avoid competition. Nor will it allow a restraint which is wider in time or space than the protection of the proprietary interest requires.⁴

¹ *Wyatt v. Kreglinger and Fernau*, [1933] 1 K.B. 793, per Scrutton L.J. at p. 806; *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461.

² *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724, at p. 733; *Morris v. Saxelby*, [1916] 1 A.C. 688, at p. 700; *Attwood v. Lamont*, [1920] 3 K.B. 571, at p. 587.

³ *Att.-Gen. for Australia v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781, per Lord Parker at p. 797.

⁴ *Kores Manufacturing Co., Ltd. v. Kolok Manufacturing Co., Ltd.*, [1957] 1 W.L.R. 1012, affirmed [1958] 2 W.L.R. 858.

The Courts have further established a distinction between the master-servant and the 'goodwill of a business' type of contract. In the *Nordenfeldt Case* Lord Macnaghten suggested that greater freedom of contract was allowable in a covenant between the buyer and seller of a business than in one between master and servant,¹ and this distinction was accepted in later cases.² A covenant against competition entered into by the seller of a business is to be considered reasonable if confined to the area within which competition would probably injure the buyer in the business sold, although, even in this case, a covenant against mere competition which is not necessary to render the sale of a business effective will not be upheld, for a man's 'liberty to trade is not an asset which the law will permit him to barter for money except in special circumstances within well-recognised limitations'.³ On the other hand, a covenant by an employee not to compete with his employer after the relation of master and servant has ceased is, in general, not reasonable. The employer is entitled only to protect that which is his, that is, his own trade secrets, or custom, and not to fetter the future exercise by the servant of his trade or skill. The ground of this distinction is thus explained by Lord Shaw in *Morris v. Saxelby*:⁴

When a business is sold, the vendor, who, it may be, has inherited it or built it up, seeks to realize this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, he himself agreeing not to compete; and the law upholds such a bargain, and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure.

In the case of restraints upon the opportunity to a workman to earn his livelihood a different set of considerations comes into play. No actual thing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energies and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand, from being deprived of the opportunity of earning his living, and in preventing the public, on the other, from being deprived of the work

¹ [1894] A.C. 535, at p. 566.

² *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; *Morris v. Saxelby*, [1916] 1 A.C. 688; *Attwood v. Lamont*, [1920] 3 K.B. 571.

³ *Vancouver Malt and Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.*, [1934] A.C. 181, *per* Lord Macmillan at p. 192.

⁴ [1916] 1 A.C. 688, at p. 713.

and service of a useful member of society. In this latter case there is not a something already realized, made over to and for the use of another; but there is a something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large.

dependent
on same
principle In both cases, therefore, the principle upon which reasonableness is determined is the same, though the application is necessarily different. The covenantee is entitled to protect what belongs to him, but not to acquire by the covenant some advantage that he does not yet possess. The buyer of a business acquires a business which from the nature of the case has been immune from competition by the man who sells it to him; it is reasonable that he should be able to protect it. But no business is, as such, immune from competition by those who have been employed in it, and it is not reasonable that an employer should try to secure such an immunity for it. On the other hand, the assets of a business often include a trade connexion or trade secrets with which an employee, in the course of his employment, becomes acquainted, and which he would, if not restrained, be in a position to depreciate after the employment has terminated; it is reasonable that an employer should be able to protect established interests such as these by a covenant against the use by his employee of information confidentially obtained or against solicitation of his customers:

The reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connexion or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of personal skill and knowledge acquired by the employee in his employer's business.¹

It is, however, not always easy to say whether a covenant is directed to the protection of trade connexion or only to the prevention of competition, for the two things may in certain circumstances be practically the same. In *Fitch v. Dewes*,² for example:

A solicitor's clerk at Tamworth agreed with his employer that after leaving his employment he would not practise within seven miles of Tamworth town hall. The covenant was unlimited in point of time.

Its validity was upheld by the House of Lords. It was pointed out that a solicitor's managing clerk must, in the course of his

¹ [1916] 1 A.C. 688, *per* Lord Parker at p. 710.

² [1921] 2 A.C. 158.

duties, acquire a knowledge of the affairs and of the clients of the business which puts him in a position in which, if not restrained, he might gravely impair the goodwill of his employer's business; and the restriction was held to be not more than was reasonably necessary for doing this.

The restraint must be reasonable not only in the interests of the covenantee, but of both parties.¹ At first sight it might appear that any restraint, since it protects the covenantee alone, must be opposed to the interests of the covenantor, but if the transaction is regarded as a whole this is clearly not so. If the vendor of a business could not covenant not to compete with the person to whom he sells it, his business would command a lower price; if an employee could not bind himself not to convey trade secrets to his employer's rival, he might not so readily obtain proper training or employment. 'As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his [i.e. the covenantor's] interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing.'²

Restraint
must be
reasonable
for both
parties

Further the test of reasonableness is the same for both parties. The Court will not 'weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint';³ in other words, it will not consider the *adequacy* of the consideration which he has received. It is reasonable that the covenantee should demand, and it is equally reasonable that the covenantor should subject himself to, a restraint which affords adequate, but not more than adequate, protection to the covenantee.

(d) *Contrary to the public interest*

Cases in which a restraint which is reasonable as between the parties has been held void as not being reasonable in the interests of the public are not common. In *Wyatt v. Kreglinger and Fernau*,⁴ however, this point was considered:

Unreason-
able in
interests
of public

The plaintiff had worked for the defendants' firm for a considerable period. On his retirement, they wrote him a letter offering him a pension of £200 per year on condition that he did not compete against them in the wool trade. There was some doubt as to whether this offer was ever specifically accepted by the plaintiff, but the defendants paid him the

¹ *Astwood v. Lamont*, [1920] 3 K.B. 571, at p. 589.

² *Morris v. Saxelby*, [1916] 1 A.C. 688, per Lord Parker at p. 707.

³ *Ibid.*

⁴ [1933] 1 K.B. 793.

pension for nine years, after which time they ceased to do so, claiming that there was no proper contract, or, if there was a contract, that it was illegal as being in restraint of trade.

The Court of Appeal upheld the defendants' plea. They differed as to whether there was a proper contract, but held unanimously that the restraint was invalid as being contrary to the public interest, as well as being unreasonable between the parties. The reason given was that such a covenant deprived the country of the services of an able-bodied man who might still be of benefit to it in his own trade.

This judgment has been justly criticized, for it is difficult to see how such a catastrophic result could occur in this particular case.¹ But it is possible to conceive of situations where it would be injurious to the public interest, say, in the case of a distinguished physicist or chemist, that a man should be tied by an agreement which, though reasonable from the point of view of the protection of his employer's proprietary interest, is yet detrimental to the community at large.² The judges have wisely retained the power to make private rights subserve the general good.

(e) *Different types of contract*

Classes of contract in restraint of trade Having thus briefly examined the principles applicable to all contracts in restraint of trade, it is now necessary to consider more particularly the three types of such contracts mentioned at the beginning of this section, namely, covenants between master and servant, between the buyer and seller of the goodwill of a business, and trade agreements.

Between master and servant (i) *Master-servant covenants*. In considering the reasonableness or otherwise of a covenant in restraint of trade exacted by a master from his servant, the first task of the Court, so it has been said, is to ascertain the nature of the master's business and of the servant's employment. It may be that the business is not of such a nature as to require extensive protection, or any protection at all. For example, in *Sir W. C. Leng & Co., Ltd. v. Andrews*:³

A Sheffield newspaper took from one of its junior reporters a covenant that he would not, after leaving his employment, be connected with any

¹ Especially since the person seeking to evade his obligations was the very person who had imposed the unreasonable stipulation.

² See *Kores Manufacturing Co., Ltd. v. Kolok Manufacturing Co., Ltd.*, [1957] 1 W.L.R. 1012, affirmed [1958] 2 W.L.R. 858.

³ [1909] 1 Ch. 763.

other newspaper within twenty miles of that city. The newspaper claimed that this was necessary to protect its 'organisation' and 'sources of information'.

It was held that these interests were not of sufficiently substantial a nature to warrant the restraint. As has already been seen, a master is generally entitled to protect only his trade secrets and custom, and not to restrain competition merely because it is undesirable.

The nature of the servant's employment is also material. It is clear, for example, that a greater measure of protection will be allowed to the master against the subsequent activities of a superior servant, such as a managing director,¹ than in the case of a temporary or inferior servant such as a travelling canvasser.² Each case must be considered in the light of its own circumstances. It may even appear after examination that the servant had no access to the trade secrets of his master, or to his customers, or was not employed in that branch of the business which the covenant seeks to protect. If that is so, the covenant is in gross, and unenforceable.

The restraint must not be more extensive in area than the master's proprietary interests require. Thus in *Mason v. Provident Clothing and Supply Co.*,³ where a canvasser in the company's Islington branch district covenanted not to work in any similar business for three years within twenty-five miles of London, the restraint was held to be unreasonable as it extended further than was legitimately warranted. But in *Fitch v. Dewes*,⁴ already cited, a covenant by a solicitor's clerk never to practise within seven miles of Tamworth town hall was considered reasonable for the protection of the solicitor's practice, as his clients were found generally within that area.

There are very few cases where the restraint has been struck down solely on the ground that it is too extensive in time. But in *Sir W. C. Leng & Co., Ltd. v. Andrews* (above)⁵ where the reporter was an infant, it was said to be unreasonable that so young a man should be bound for the rest of his life; and in *M. & S. Drapers v. Reynolds*⁶ where a collector salesman of a drapery firm covenanted not to canvass his employer's customers for a term of five years from the determination of his employment, this period was held to be too long in view of the

¹ *Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Co.*, [1894] A.C. 535. ² *M. & S. Drapers v. Reynolds*, [1957] 1 W.L.R. 9.

³ [1913] A.C. 724.

⁴ [1921] 2 A.C. 158; *supra*, p. 306.

⁵ [1909] 1 Ch. 763.

⁶ [1957] 1 W.L.R. 9.

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humble position which he occupied. Nevertheless, even restraints without limit of time will be allowed in appropriate cases, particularly, for example, where the protection of a solicitor's or other professional practice is concerned.¹

Contracts which are held to be reasonable between the parties will seldom be invalidated on the ground that they are contrary to the public interest.²

Between
vendor and
purchaser
of goodwill

(ii) *Sale of the goodwill of a business.* Considerably more latitude is allowed to covenants which accompany the sale of the goodwill of a business than in the case of contracts between master and servant. The reasons for this have already been noted.³ Covenants in gross, however, which do not protect the business actually sold, and whose object is merely to restrain competition, will not be upheld. In the *Nordenfeldt Case*⁴ it will be remembered that a covenant 'not to engage in any business likely to compete with that for the time being carried on by the company' was considered unreasonable. Also in *Vancouver Malt and Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.*⁵

The appellants held a Dominion brewer's licence for the manufacture of beer, but the only trade actually carried on by them was the manufacture of sake, a Japanese rice spirit. They assigned their brewer's licence to the respondents for \$15,000, and covenanted not to brew beer for fifteen years thereafter.

The Judicial Committee of the Privy Council held that this covenant was void. There was at the time of the assignment no brewing business to protect; the covenant was therefore in gross and unenforceable.

There seems to be no case in which an otherwise reasonable covenant has been struck down as contrary to the public interest.⁶

Trade
combina-
tions

(iii) *Trade agreements.* A common feature of business organizations in a capitalist society is that they frequently enter into agreements to regulate the production and marketing of the commodities manufactured by them, and to maintain prices and standards by means of trade combinations.⁷

¹ *May v. O'Neill* (1875), 44 L.J.Ch. 660; *Fitch v. Dewes*, [1921] 2 A.C. 158.

² *Viz. supra*, p. 307.

³ *Supra*, p. 305.

⁴ [1894] A.C. 535; *supra*, p. 302.

⁵ [1934] A.C. 181.

⁶ See, however, *Kores Manufacturing Co., Ltd. v. Kolok Manufacturing Co., Ltd.*, [1957] 1 W.L.R. 1012, affirmed [1958] 2 W.L.R. 858.

⁷ See the Reports of the Monopolies Commission, set up by the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 (11 & 12 Geo. VI, c. 66).

Such agreements are, like all others in restraint of trade, *prima facie* void, but if they are shown to be reasonable between the parties and not contrary to the public interest, they will be upheld. It is very rare for the Courts to allow a party to escape from his contractual obligations in these cases by pleading that they are unreasonable.¹

But in *McEllistrim v. Ballymacelligot Co-operative Society*:²

A number of persons in County Kerry in Ireland formed a co-operative society for the marketing of milk produced by them. Rule 6 of the society bound its members not to sell to any other than the society's recognized creameries. Rule 16 provided that members could not withdraw from the society except by the transfer of their shares, and rule 21 that no share was to be transferred without the consent of the committee of the society. This meant virtually that each member might be bound for life.

The House of Lords held that these three rules, when taken together, imposed a restraint greater than that reasonably required for the protection of the society, and that the arrangement was void. Similarly in the case of *Evans (J.) & Co. v. Heathcote*:³

The members of a 'Cased Tube Association' entered into a combination for the purpose of regulating the price and output of cased tubes. They covenanted to sell only on the terms and at the prices determined by the association. There was no provision for voluntary withdrawal.

The Court of Appeal held that the covenant was too extensive to be reasonable and was void at common law. But since the Association came within the definition of a 'Trade Union', the agreement was saved by the Trade Union Acts of 1871⁴ and 1876;⁵ and so, although it could not be directly enforced, any debt created by the agreement could be the subject of an account stated and so recoverable. Trade Unions still, of course, enjoy special privileges in this respect.

The Courts have never been over-fond of price maintenance agreements, but they have nevertheless been unwilling to strike down trade combinations as contrary to the public interest unless they showed that they were calculated to produce a 'pernicious monopoly'. In *Palmolive Co. (of England), Ltd. v. Freedman*,⁶ this point was raised, but without success:

¹ *English Hopgrowers, Ltd. v. Dering*, [1928] 2 K.B. 174, *per* Scrutton L.J. at p. 181.

² [1919] A.C. 548.

³ [1917] 2 K.B. 336; reversed [1918] 1 K.B. 418 on a different point.

⁴ 34 & 35 Vict., c. 31, s. 2.

⁵ 39 & 40 Vict., c. 22, amending the Act of 1871.

⁶ [1928] Ch. 264.

The defendant agreed with the plaintiffs, a firm of soap manufacturers, not to sell their soap, howsoever acquired, at less than sixpence a tablet. In exchange, he received certain benefits by way of a trade discount.

It was considered that there was no tendency to create a monopoly, as the plaintiffs were not the only manufacturers of soap in this country and could not boost prices to an extravagant extent.¹

Act of 1956 The legislature has, however, seen fit to intervene in such trade combinations. In 1956 the Restrictive Trade Practices Act was passed which provides for the compulsory registration of restrictive trading agreements, and for their examination by a special Court.² The Court has power to prohibit those which it considers to be contrary to the public interest.³ It may, however, be that the common law is left untouched, and that agreements which are upheld by the court may yet be void at common law;⁴ but this contingency is unlikely to occur. Agreements for the collective enforcement of conditions as to resale prices are prohibited by the Act.⁵

II. THE EFFECT OF ILLEGALITY OR INVALIDITY

What is the effect of illegality? It has already been pointed out that the borderline between illegal and merely void contracts is not altogether clear, and that the Courts are not always concerned to distinguish between them.⁶ We may, however, observe that the single word 'illegal' may embrace varying degrees of impropriety, and it should not be supposed that the effects of an illegal contract are always identical. Certain contracts are illegal in a severe sense; the Courts will refuse to facilitate the parties in any way. Others are more conveniently termed void,⁷ since they are not so completely without legal effect. It is not always easy to determine in which category a particular contract lies, but that the categories exist would seem to be beyond doubt. In the former we may at least place agreements to commit a criminal offence or to do

¹ [1928] Ch. 264, *per* Lawrence L.J. at p. 282.

² 4 & 5 Eliz. II, c. 68. See also the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 (11 & 12 Geo. VI, c. 66).

³ s. 21. An agreement is presumed to be contrary to the public interest unless it can be brought within one of the exceptions set out in this section.

⁴ Wilberforce, *Restrictive Trade Practices and Monopolies* (1957), § 218.

⁵ s. 24.

⁶ *Supra*, p. 277.

⁷ The use of the word 'void' should not here be confused with its use in relation to, for example, mistake.

an act forbidden by statute, and agreements which are sexually immoral; in the latter, at least agreements in restraint of trade and those which oust the jurisdiction of the Courts. Beyond this it is not possible to go with any certainty, and each case must be assigned empirically according to the degree of impropriety involved. In the present section, however, we shall, unless otherwise stated, be dealing with those contracts which are illegal in the strict sense of the word.

The fundamental principles upon which the Courts will act when they have to deal with an illegal contract were long ago explained by Lord Mansfield:¹

The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *prior est conditio defendantis*.

No suit may be brought to enforce an illegal contract, nor will the Courts recognize any cause of action founded upon it.

The Intention of the Parties

Where the object of the contract is an unlawful act the contract is void, though the parties may not have known that their act was illegal or intended to break the law. But if the contract admits of being performed, and is performed, in a legal way, the intention of the parties will be important; for if they did not intend to break the law, and the law has in fact not been broken, money due under the contract will be recoverable even though the performance as originally contemplated would have involved a breach of the law. In *Waugh v. Morris*:²

Intention
may be
material

where
contract
legally
performed

¹ *Holman v. Johnson* (1775), 1 Cowp. 341, at p. 343. See also Glanville Williams, [1942] Camb L.J. 51; Grodecki (1955), 71 L.Q.R. 254.

² (1873), L.R. 8 Q.B. 202.

The defendant chartered a ship belonging to the plaintiff to take a cargo of hay from Trouville to London. It was subsequently agreed that the hay should be unloaded alongside ship in the river, and landed at a wharf in Deptford Creek. Unknown to the parties an Order in Council (made before the charter-party was entered into) had forbidden the landing of French hay. The defendant, on hearing this, took the cargo from alongside the ship without landing it, and exported it, thus avoiding a breach of the Order in Council. The return of the vessel was delayed, and the plaintiff sued for damages arising from the delay.

The defendant pleaded as a defence that the contract of charter-party contemplated an illegal act, the landing of French hay contrary to the Order in Council. This defence did not prevail:

Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance.¹

The contract is not illegal in the absence of proof of an intention to perform it in an unlawful manner.

or illegal
intent of
one party
only

There is also another case in which the intention of the parties may be important. If the contract is one to do something which is lawful in itself, but which one of the parties intends to use for the furtherance of some illegal purpose, the rights and remedies of the other will depend upon whether he knew of or participated in the illegal intention.

The guilty party is normally remediless. In *Berg v. Sadler and Moore*,² for example:

The plaintiff, a tobacconist, after having been placed by the defendants on their 'stop-list' for selling their cigarettes at cut prices, persuaded another retailer to order cigarettes for him so as to get round the ban. He paid for the cigarettes, but the defendants discovered the trick and refused to deliver the cigarettes or return the money.

It was held that he could not reclaim the money. To do so he would have to disclose that he had paid it in an attempt to effect a fraudulent purpose, and the Court refused to assist him in any way. Similarly, of course, if both parties share the unlawful intention, as in *Pearce v. Brooks*,³ where both knew that

¹ (1873), L.R. 8 Q.B. 202, per Blackburn J. at p. 208.

² [1937] 2 K.B. 158. A very difficult case—the presence of fraud does not normally render a contract *illegal*; and cf. *St. John Shipping Corporation v. Joseph Rank, Ltd.*, [1957] 1 Q.B. 267.

³ (1866), L.R. 1 Ex. 213; *supra*, p. 298.

the brougham was to be used for the purpose of prostitution, no action can be maintained.

On the other hand, if one party knows nothing of the illegal purpose throughout the transaction, he is entitled to recover what may be due to him under the contract, or to obtain damages in full. If he becomes aware of the illegal purpose of the transaction before it is completed or while it is still executory he may refuse to perform the contract. Thus in *Cowan v. Milbourn*:¹

The defendant agreed to let a set of rooms to the plaintiff for certain days; then he discovered that it was proposed to use the rooms for the delivery of lectures which were unlawful because blasphemous within the meaning of 9 & 10 Will. III, c. 32. He refused to carry out the agreement.

It was held that he was entitled to do so. Moreover, if he has himself executed part of the contract before he discovers the illegality, he can sue on a *quantum meruit* for the work already done. So in *Clay v. Yates*² a printer was able to recover the value of work done by him towards the publication of a treatise which, after the major part of it had been printed, he found to contain defamatory material.

If, however, the innocent party to a contract discovers the illegal purpose before it is carried into effect, he cannot recover if he allows it to proceed none the less. The defendant in *Cowan v. Milbourn* could not have recovered the rent of his rooms, if, having let them in ignorance of the plaintiff's intentions, he had allowed the tenancy to go on after he had learned the illegal purpose which his tenant contemplated.

But these considerations do not apply where a statute actually *forbids a contract to be made*. In such a case, lack of knowledge is immaterial to the consideration whether or not an offence has been committed. In *Re Mahmoud and Ispahani*:³

Statute which forbids contract to be made

By a wartime statutory order it was forbidden to sell linseed oil to persons who did not possess a licence from the Food Controller. The plaintiff agreed to sell and deliver to the defendant a quantity of linseed oil, and, before the contract was made, asked the defendant whether he possessed a licence. The defendant falsely assured him that he did. Subsequently, however, he refused to accept the oil on the ground that he had no licence. The plaintiff brought an action for damages for non-acceptance.

¹ (1867), L.R. 2 Ex. 230.

² (1856), 1 H. & N. 73.

³ [1921] 2 K.B. 716.

The Court of Appeal refused to entertain the action. 'The Order', said Bankes L.J.,¹ 'is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into.' The innocent party is not, however, entirely without remedy. If he has been led to commit the offence by the representation or promise of the other, then he can recover damages for fraud if there is fraud, or for breach of promise or warranty if he prove such to have been given,² provided that he himself has not been guilty of culpable negligence on his part, disabling him from that remedy.³ So a builder has recovered damages for the breach of an assurance by his client that he would obtain the necessary licences to enable the work to be carried out.⁴

Contracts Unlawful 'per se'

Contract Where a contract is rendered illegal by common law or *per se* statute so that it cannot be performed without a breach of the *illegal* law, a party to such a contract cannot come into court and ask to have the illegal object carried out; nor can he set up a case in which he must necessarily disclose the illegal transaction as the groundwork of his claim; and this rule holds although neither party had any intention of breaking the law for *ignorantia juris haud excusat*.

This principle is expressed in the maxim *in pari delicto potior est conditio defendentis* and it may be illustrated by the case of *Parkinson v. College of Ambulance, Ltd.*:⁵

The secretary of a charitable organisation promised the plaintiff that he would secure for him a knighthood if he would make a sufficient donation to the organisation's funds. In consideration of this promise, the plaintiff paid over £3,000 and promised more when he should receive the honour. The knighthood never materialised, and the plaintiff sued for the return of his money.

¹ At p. 724.

² *Strongman (1945), Ltd. v. Simcock*, [1955] 2 Q.B. 525, *per* Denning L.J. at p. 536. The Court may also imply a term in the contract that the plaintiff should not be required to do anything which is illegal: *Burrows v. Rhodes*, [1899] 1 Q.B. 816; *Gregory v. Ford*, [1951] 1 All E.R. 121; *Road Transport & General Insurance Co. v. Adams*, [1955] C.L.Y.B. 2455.

³ *Askey v. Golden Wine Co., Ltd.*, [1948] 2 All E.R. 35.

⁴ *Strongman (1945), Ltd. v. Simcock*, [1955] 2 Q.B. 525.

⁵ [1925] 2 K.B. 1; *Taylor v. Chester* (1869), L.R. 4 Q.B. 309; *Harse v. Pearl Life Assurance Co.*, [1904] 1 K.B. 558; *Berg v. Sadler and Moore*, [1937] 2 K.B. 158. For a criticism of this maxim, see Grodecki (1955), 71 L.Q.R. 254.

It was held that the action must fail as it was founded upon a transaction which was illegal at common law.

But there are exceptional cases in which a man will be relieved of an illegal contract into which he has entered—cases to which the maxim just quoted does not apply. They fall into three classes: (1) the invalidating statute may not prohibit the contract itself, but merely impose certain obligatory conditions as to the manner of its performance; (2) no part of the illegal consideration may have been carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (3) the plaintiff may not be *in pari delicto* with the defendant.

We shall consider each of these exceptions in turn.

(a) *Legal inception but illegal performance*

Certain statutes do not prohibit entirely the making of a particular type of contract, but merely impose conditions as to its performance. If these conditions are not fulfilled, the party in default will not be able to sue on the contract. In *Anderson, Ltd. v. Daniel*,¹ for example, a vendor who sold fertilizer without the delivery to the purchaser of an invoice specifically required by the Fertilizers and Feeding Stuffs Act, 1906, was unable to recover the price. Such contracts are not, however, unlawful in their inception; there is nothing unlawful *per se* in a contract to sell fertilizer. There is no reason why the innocent party should not bring an action for non-delivery or for breach of warranty. He does not have to rely on the illegal performance in order to establish his cause of action. Such at any rate seems to be the opinion of the Court of Appeal in *Marles v. Philip Trant & Sons, Ltd.*:²

The defendants, a firm of seed merchants, bought from one M. a quantity of wheat described as 'spring wheat'. They sold this wheat to various farmers, including the plaintiff, but when the wheat came up it was found not to be spring wheat and the crops failed. The plaintiff brought this action against the defendants claiming damages for breach of warranty. The defendants, as they were entitled to do, brought in M. as third party to the action, claiming from him an indemnity in respect of the plaintiff's claim and damages. The third party, however, raised the defence that the defendants had not, at the time of sale, delivered to the plaintiff certain particulars in writing as required by s. 1 (1) of the Seeds Act, 1920. He therefore contended that he was not bound to indemnify

¹ [1924] 1 K.B. 138; *B. & B. Viennese Fashions v. Losane*, [1952] 1 All E.R. 909.

² [1954] 1 Q.B. 29.

the defendants, as they could not be made liable on a contract which was illegal.

It was held by Singleton and Denning L.JJ., with Hodson L.J. dissenting,¹ that the contract between the defendants and the plaintiff was not illegal from the beginning, but was only rendered illegal later by the method of performance which did not comply with the statutory requirements. The plaintiff could recover damages for breach of warranty, since the warranty was given on the lawful stage of the agreement. The third party's contention that he was not liable to compensate the defendants in respect of their liability under this head therefore failed.

(b) *Illegal purpose not yet accomplished*

Illegality not yet intervened The second exception relates to cases where money has been paid, or goods delivered, for an unlawful purpose which has not been carried out because the plaintiff repented in time.

The law is not quite satisfactorily settled on this point, but its present condition would seem to demand that two conditions be satisfied. First, the party seeking to recover must repent of the transaction before the illegal purpose is substantially executed. Secondly, the repentance must be genuine and not be merely frustration by circumstances over which he has no control.

Locus poenitentiae While the illegality is still executory, the parties are allowed a *locus poenitentiae*, an opportunity to change their minds; but some doubt exists as to when this privilege ceases. In *Taylor v. Bowers*² it was said by Mellish L.J. that:

If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out: but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action.

The facts of the case to which these words applied were as follows:

The plaintiff, a debtor, had made a fictitious assignment of his goods to one A. in order to defraud his creditors. The contemplated fraud was never carried out, but A. had in the meantime parted with the goods to the defendant under a bill of sale.

¹ 'They [the defendants] cannot rely upon the breach of warranty by a third party to prove their damages when those damages are to be measured by reference to a contract illegally performed by them.'

² (1876), 1 Q.B.D. 291, at p. 300.

It was held that the plaintiff was entitled to recover the goods. It is nevertheless difficult to say that the fictitious assignment was anything but a part-performance of the illegal purpose, since the creditors would clearly have been less likely to have pressed their claims in view of the assignment. Therefore the principle, as stated in *Taylor v. Bowers*, would seem to be that repentance is possible at any time before performance has been completed.

Subsequent cases, however, do not bear out this view. In *Kearley v. Thomson*,¹ for instance:

The defendants, a firm of solicitors acting for a petitioning creditor of one Clarke, a bankrupt, agreed with the plaintiff, a friend of Clarke, that in consideration of the payment of their costs they would not appear at the public examination of Clarke, nor oppose the order for his discharge. They carried out the first part of the agreement, but before any application was made for Clarke's discharge, the plaintiff changed his mind and sought to recover the money which he had paid.

His action failed. It was held that the agreement was illegal as tending to pervert the course of justice, and that recovery was precluded as the illegal purpose had already been partly performed. The extent of the application of the principle laid down by Mellish L.J. in *Taylor v. Bowers*, and even the principle itself, might, said the Court, require reconsideration. In any case there could be no recovery where the illegal purpose, as in the case before the Court, had been carried into effect in a substantial manner.² Similarly in *Herman v. Feuchner*:³

The plaintiff procured the defendant to go bail for him on the terms that he deposited the amount of his bail in the defendant's hands as an indemnity against his possible default. The plaintiff did not fail to appear, and sued the defendant for the amount of the money deposited.

The Court of Appeal held that the illegal object was carried out when, by reason of the plaintiff's payment to the defendant, the defendant lost all interest in seeing that the conditions of the recognizance were performed. The plaintiff was therefore not entitled to reclaim the money. Thus it appears that where substantial, or even part, performance of the illegal purpose has taken place, money paid or goods delivered in pursuance of it cannot be recovered back.

What the law allows in these cases is a *locus poenitentiae*, and therefore, whilst it will help one who *repents*, it will not help

Repentance
must be
genuine

¹ (1890), 24 Q.B.D. 742.

² Ibid., per Fry L.J. at p. 747.

³ (1885), 15 Q.B.D. 561.

one who has abandoned his illegal purpose only because that purpose has been frustrated by the failure of the other contracting party to fulfil his side of the illegal contract, or in some other way. An example of such a refusal can be found in *Bigos v. Bousted*:¹

In breach of the provisions of the Exchange Control Act, 1947, *A* entered into an agreement with *B* whereby *B* agreed to make available £150 worth of Italian currency to enable *A*'s wife and daughter to travel in Italy. As security, *A* deposited with *B* a share certificate. The promised money was never forthcoming, and *A* sued *B* to recover the certificate.

It was pleaded on *A*'s behalf that he was entitled to a *locus poenitentiae* as the illegal contract had not been performed, but this contention was rejected by Pritchard J. He held that there was no true repentance on *A*'s part; the contract had merely been frustrated by *B*'s failure to supply the money.

except marriage brokage contracts Marriage brokage contracts, however, constitute an exception to the general rule. In *Hermann v. Charlesworth*:²

A maiden lady paid the sum of £52 to the proprietor of a newspaper, known as *The Matrimonial Post and Fashionable Marriage Advertiser*, with a view to obtaining by advertisement an offer of marriage. After advertisements had appeared, and several prospective suitors had been introduced, but before any marriage had been arranged, she brought an action to recover the money.

It was argued on behalf of the defendant that, inasmuch as the contract had been in part performed, the action could not be maintained. But Collins M.R. said:³

There was no objection at Common Law, till perhaps some hundred years ago, to such contracts; but the Courts of Equity took a different view, and in consequence the Courts of Common Law modified their view of the matter and shaped their course accordingly. Equity did not take the view that in the case of a contract of this particular kind, tainted with illegality, a case for relief could only be considered when there had been a total failure of consideration. As was pointed out by Lord Hardwicke in *Cole v. Gibson*,⁴ Equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place.

On this ground, therefore, that the common law, in taking over the equitable rule against marriage brokage contracts, had taken it over in the form in which equity had developed it, the plaintiff was held entitled to recover the money she had paid.

¹ [1951] 1 All E.R. 92.

³ At p. 133.

² [1905] 2 K.B. 123.

⁴ (1756), 1 Ves. Sen. 503.

At the other end of the scale, however, it seems unlikely that the Courts would allow any *locus poenitentiae* at all in the most serious cases of moral reprehensibility, as for example, where money is paid to another to commit murder.¹

No locus
poenitentiae
at all

(c) *Parties not 'in pari delicto'*

Where the parties are not *in pari delicto* the less guilty party may be able to recover money paid, or property transferred, under the contract. This possibility may arise in three situations.

Parties not
in pari
delicto

First, the contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one. As Lord Mansfield explained in *Browning v. Morris*:²

where
statute
passed to
protect
one class of
persons

But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

The Moneylenders Acts provide an illustration of this type of case.³ A contract made with a moneylender who has failed to register himself under the Acts is illegal and void. The lender cannot therefore recover the money lent; but since the Acts were passed for the protection of persons dealing with moneylenders, the borrower, though he has entered into an illegal contract, can recover securities placed in the hands of the lender.⁴

The intention of the statute is of prime importance. In *Green v. Portsmouth Stadium, Ltd.*:⁵

The plaintiff, a bookmaker, alleged that, over a long period of time, he had been overcharged by the defendants for admission to a greyhound track run by them. The Betting and Lotteries Act, s. 13 (1), allowed a charge to be made to bookmakers not exceeding five times the highest fee for the public at large, but the plaintiff had been compelled to pay considerably more. He claimed the excess from the defendants in an action for money had and received.

¹ *Kearley v. Thomson* (1890), 24 Q.B.D. 742, per Fry L.J. at p. 747.

² (1778), 2 Cowp. 790, at p. 792.

³ See also *Gray v. Southouse*, [1949] 2 All E.R. 1019 (recovery of illegal premium under Rent Acts).

⁴ *Bonnard v. Dott*, [1906] 1 Ch. 740; though it has been held in *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300 that the borrower may be put on terms as to the repayment of the sum borrowed. Cf. *Cohen v. Lester (J.)*, Ltd., [1939] 1 K.B. 504, and *Kasumu v. Baba-Egbe*, [1956] A.C. 539.

⁵ [1953] 2 Q.B. 190.

The Court of Appeal held that the action must fail. The Act merely provided penalties for breach; it was not a book-makers' charter. The statute was not passed 'to protect one set of men from another set of men', at any rate, not so as to give bookmakers the right to bring civil proceedings for the recovery of their money.

Secondly, the plaintiff may have been induced to enter into the contract by fraud or strong pressure. Two decisions illustrate this ground for relief. In *Reynell v. Sprye*:¹

Sir Thomas Reynell was induced by the fraud of one Sprye to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery.

It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the Court was satisfied that he had been induced to enter into an agreement by the fraud of Sprye, and considered him entitled to relief. Similarly a woman who was fraudulently induced by the agent of an insurance company to take out an insurance which was in fact illegal was able to recover the premiums which she had paid.²

In *Atkinson v. Denby*:³

The plaintiff, a debtor, offered his creditors a composition of 5s. in the pound. The defendant was an influential creditor whose acceptance or rejection of the offer might determine the decision of several other creditors. He refused to assent to the composition unless the plaintiff would make him an additional payment of £50 in fraud of the other creditors. This was done and the composition arrangement was carried out. The plaintiff then sued to recover the £50 on the ground that it was a payment made by him under oppression.

It was held that he could recover. The Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, observed:⁴

It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because one has the power to dictate, the other no alternative but to submit.

Thirdly, an agent or trustee will not be allowed to retain property or to refuse to account for moneys received on the

¹ (1852), 1 De G. M. & G. 660.

² *Hughes v. Liverpool Victoria Legal Friendly Society*, [1916] 2 K.B. 482. Cf. *Harse v. Pearl Life Assurance Co.*, [1904] 1 K.B. 558 where no fraud present.

³ (1861), 6 H. & N. 778, affirmed (1862), 7 H. & N. 934.

⁴ (1862), 7 H. & N. 934, at p. 936.

ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction. An extreme case which illustrates this principle concerning fiduciary relationships is that of *Farmer v. Russell*:¹

The defendant had been engaged by the plaintiff to dispose on commission of counterfeit halfpence to sailors in Portsmouth and having done so had failed to account for the proceeds. The plaintiff brought an action to recover these.

He succeeded in his claim. It might have been thought that this case could no longer be considered good law, particularly when, as here, the action is tainted to a serious degree by moral turpitude. Nevertheless Scrutton L.J. in a later case used language which seems to assume that it was correct:²

In such a case there was no illegality between plaintiff and defendant; the defendant was saying that the money had come to him as the proceeds of an illegal contract, and therefore one of the parties to the contract could not claim it from him, though the other party did not object to its being paid over. The case appears quite different when the unenforceability is in the direct contract between the plaintiff and the defendant, not in a collateral contract under which the defendant has received the money.

It is submitted, however, that the Courts would be unlikely today to afford any recognition to a commission for the carrying out of a criminal offence.

Plaintiff not Relying on the Illegal Contract

The policy of the law prohibits the enforcement of an illegal contract or of any claims arising out of it; but if the plaintiff can so frame his action that he is not forced to rely on the illegal agreement, he will be permitted to assert any independent rights which he may have to property which has been transferred under it.

Plaintiff
does not
rely on
illegal
agreement

This principle is extremely difficult of application since it is frequently hard to determine whether the plaintiff is relying upon an independent right such as ownership, or upon the contractual provisions of the illegal agreement. For example, it seems probable that a landlord can recover premises let to a tenant under an illegal agreement once the term of years has

¹ (1798), 1 B. & P. 296.

² *Rawlings v. General Trading Company*, [1921] 1 K.B. 635, at p. 646 (dissenting).

expired;¹ but it is a matter of doubt whether he could recover them in the meantime under a covenant which provided for forfeiture for non-payment of rent. Would he be relying on his independent right of ownership, or upon the contractual provisions of the illegal lease? In the case of chattels, at any rate, the bailor seems to be in the more favoured position. In *Bow-makers, Ltd. v. Barnet Instruments, Ltd.*:²

The defendants entered into a contract whereby they agreed to hire-purchase from the plaintiffs certain machine tools. Such an agreement was rendered illegal by a government order which prohibited the disposition of machine tools without a licence from the Ministry of Supply. The defendants failed to make the agreed payments for hire. They further sold some of the tools and refused to deliver up to the plaintiffs others still in their possession. The plaintiffs sued for damages for conversion.

It was contended on behalf of the defendants that since the contract of hire-purchase was illegal, the plaintiffs could have no remedy on it. They pointed to the case of *Taylor v. Chester*³ in 1869 where a man failed to recover half of a £50 bank note deposited by him to secure the payment of money for a night's debauch in a brothel. To this the plaintiffs replied that they were not relying on the contract, but upon their paramount right of ownership, the bailment having come to an end. The case of *Taylor v. Chester* was distinguishable because the pledge was still in existence, whereas in the present case all possessory rights of the defendants had been extinguished. This latter argument was adopted by the Court of Appeal:

In our opinion [said du Parcq L.J.⁴] a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.

This case has been criticized⁵ on the ground that the Court, by allowing the plaintiff to bring his action in tort, was in effect

¹ *Jaibhay v. Cassim*, [1939] A.D. 537 (South Africa); *Gas Light & Coke Co. v. Turner* (1839), 5 Bing. N.C. 666, per Tindal C.J. at p. 677; *Alexander v. Rayson*, [1936] 1 K.B. 169, per curiam at p. 186.

² [1945] K.B. 65.

³ (1869), L.R. 4 Q.B. 309.

⁴ [1945] K.B. 65, at p. 71.

⁵ Hamson (1949), 10 Camb. L.J. 249; Paton, *Bailment in the Common Law* (1952), p. 34.

permitting the enforcement of the provisions of an illegal contract. Also it seems probable that, if the bailment was intimately connected to the knowledge of the bailor with an offence of gross moral turpitude, for example, the loan of a dagger to commit murder, the Court would not countenance recovery.

Comparative Effects of Illegality and Avoidance

We have mentioned the difficulty of distinguishing between illegal and void contracts.¹ We now have to consider what difference of effect the distinction produces. Illegal and void contracts

Certain contracts are not illegal in the strict sense of the word; they are merely nugatory and void. 'The law does not punish them. It simply takes no notice of them.'² Thus, although the Betting and Lotteries Act, 1934,³ enacts that, with two exceptions, 'all lotteries are *unlawful*', the Gaming Act, 1845,⁴ merely provides that gaming and wagering contracts shall be 'null and void'. Similarly, at common law, an agreement to defraud the revenue is strictly illegal,⁵ whereas an agreement to oust the jurisdiction of the Courts, or a covenant in restraint of trade, is simply considered void.⁶ As Void contracts between the original parties themselves the contract is a 'nullity' in either case. But 'no Court will lend its aid to a man who founds his cause of action on an immoral or illegal act',⁷ and these words of Lord Mansfield seem to provide us with a clue to the distinction. They do not mean only that no Court will *enforce* an illegal contract, for that would be equally true of a void contract. They mean also that, whatever kind of relief a man may be seeking, the Court will not assist him if, in order to make out his case, he is obliged to rely on an *illegal* transaction to which he has been a party. The effects of invalidity do not, however, extend this far.

There seem to be three situations where it may be important to determine whether the contract is illegal or simply void: (1) Importance of distinction where one party has transferred property, or paid money, or performed services pursuant to such a contract; (2) where there is a second contract collateral to the illegal or void agreement;

¹ *Supra*, p. 277.

² *Bennett v. Bennett*, [1952] 1 K.B. 249, *per* Denning L.J. at p. 260.

³ 24 & 25 Geo. V, c. 58, s. 21.

⁴ 8 & 9 Vict., c. 109, s. 18; *supra*, p. 283.

⁵ *Alexander v. Rayson*, [1936] 1 K.B. 169.

⁶ *Bennett v. Bennett*, [1952] 1 K.B. 249.

⁷ *Holman v. Johnson* (1775), 1 Cowp. 341, at p. 343.

(3) where a negotiable instrument has been given as security. We will consider each of these in turn.

(i) Rights
of restitu-
tion more
flexible in
void con-
tracts

In the first situation it will be remembered that no action can normally be brought by a 'guilty' party on a contract which is illegal: *ex turpi causa non oritur actio*. Property transferred cannot be recovered; money paid cannot be reclaimed; services rendered need not be paid for. But where the contract is merely void without being also illegal, rights of restitution are somewhat more flexible. If the plaintiff has parted with possession of his property, he may be able to recover it by asserting his ownership;¹ if he has paid over money, he may be able to reclaim it (whether or not the consideration for it has totally failed);² if he has performed services, he may be entitled to sue on a *quantum meruit* for their value.³ He cannot do so in every case and we shall have to consider the limits of this right of restitution in a later chapter.⁴ For instance, where is no doubt that one who has lost a bet and paid it cannot recover what he has paid, even though the bet was only void;⁵ but what disables him from recovering in that case is not the fact that he is obliged to disclose the fact that he has made a contract which the law declares to be void. His action would fail, but it would not arise *ex turpi causa*. It would fail because the payment would have been made voluntarily in discharge of an obligation known not to be binding, and accordingly he would be unable to show any cause why he should recover it.

(ii) Col-
lateral
agreements

Secondly, where the parties enter into a subsequent agreement which is collateral to an illegal transaction, the collateral agreement becomes itself tainted with the illegality. Thus in *Fisher v. Bridges*:⁶

Certain lands were conveyed by the plaintiff to the defendant for an illegal purpose. Subsequently the defendant executed a deed to secure the payment of the price for the land.

It was held that the deed too was illegal and unenforceable. Jervis C.J., delivering the judgment of the Court of Exchequer Chamber, said of the deed:⁷

It springs from, and is a creature of, the illegal agreement; and, as the law would not enforce the original illegal contract, so neither will it allow

¹ *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1945] K.B. 65, although there the contract was illegal.

² *Chappell v. Poles* (1837), 2 M. & W. 867; *infra*, p. 553.

³ *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403; *infra*, p. 561.

⁴ *Infra*, p. 554.

⁶ (1854), 3 E. & B. 642.

⁵ *Supra*, p. 283.

⁷ At p. 649.

the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.

On the other hand, a contract which is collateral to a void transaction is not itself void unless it merely restates the void agreement and is supported by no other consideration.¹

Thirdly, as we have seen in the case of gaming and wagering contracts, it may be material to inquire whether a contract is illegal or only void when a negotiable instrument has been given as security for its performance. Whether the contract is illegal or void, the instrument is, as between the immediate parties, void. But if the negotiable instrument passes into the hands of a third party, that party's rights will differ according as the contract in respect of which it is given was illegal or void.²

If the instrument is made and given to secure payment of money due or about to become due upon an *illegal* transaction, a subsequent holder loses the benefit of the rule as to negotiable instruments to the effect that consideration is presumed till the contrary is shown; he must prove that consideration has been given either by himself or by some immediate holder, and without notice of the illegality, before he will be entitled to recover. But if the instrument is given to secure payment of money due or about to become due on a *void* transaction, although the instrument is void as between the immediate parties, a subsequent holder is not prejudiced by the fact that the original transaction is void, and consideration will be presumed in his favour.

We may illustrate this distinction by referring to the case of *Fitch v. Jones*:³

The defendant executed a promissory note in payment of a bet on the amount of hop duty in 1854. The note was subsequently indorsed to the plaintiff.

The bet was void by the Gaming Act, 1845, and the Court was clear that as between the original or immediate parties the note was void also. There was no liability to pay the lost bet; and therefore no consideration for the note given to secure its payment. The action, however, was brought by the indorsee of the note, and the main question was whether the plaintiff was bound, on proof of the origin of the note, to show that he had given consideration for the note, or whether it was for the

(iii) Negotiable instruments

Examples from gaming transactions

¹ *Hyams v. Stuart King*, [1908] 2 K.B. 696 (now overruled in respect of the effect of s. 18 of the Gaming Act, 1845).

² *Infra*, p. 386.

³ (1855), 5 E. & B. 238.

defendant to prove that he had given none. The note being given, not on an illegal, but on a void, consideration, the Court held that the onus was not on the plaintiff, but on the defendant.

The result would, however, have been different if the note had been given in respect of a wager on a 'game or pastime', for, as we have seen,¹ the effect of the Gaming Act, 1835, is that such a security is deemed to have been given for an illegal consideration. The taint of illegality affects a subsequent holder, who must show that consideration has subsequently been given for the security, and may still be disentitled to recover, unless he also proves that the consideration was given in good faith without notice of the illegality of its origin.² If, on the other hand, the security is given in respect of a wager *not* on a game or pastime, it is immaterial whether the subsequent holder for value knew the circumstances of its origin or not.³

Contracts Lawful where made but Unlawful in England

Illegal
contracts
in conflict
of laws

Normally the question whether an obligation has been validly and legally created is determined by reference to the proper law of the contract, that is, to the law of the country with which it has the most substantial connexion.⁴ If a contract is valid by its proper law, it is considered to be valid in the Courts of this country.⁵ So far does this rule go that, in 1860, a contract for the purchase and delivery of slaves, made, and to be performed in Brazil, was held (with two judges dissenting) to be actionable in England, on the ground that the contract was lawful in the place where it was made and was not prohibited by the statutes relating to slave trading then in force.⁶ At the present day, however, it is no longer possible to determine the enforceability of a foreign contract solely by reference to the proper law. Certain limitations have been imposed which render it necessary to consider the effect of the law of this country as well.

In the first place, if the contract is prohibited by an Act of the United Kingdom Parliament, it cannot be enforced here.⁷

¹ *Supra*, p. 283.

Tatam v. Haslar (1889), 23 Q.B.D. 349.

Lilley v. Rankin (1886), 56 L.J.Q.B. 248.

⁴ See generally Cheshire, *Private International Law* (5th ed.), pp. 150, 232.

⁵ Although not necessarily enforceable: *Leroux v. Brown* (1852), 12 C.B. 801.

⁶ *Santos v. Illidge* (1860), 8 C.B., N.S. 861.

⁷ *Boissevain v. Weil*, [1950] A.C. 327.

Secondly, where a contract requires performance to be carried out in another country, it is an implied term of the contract that performance shall not be illegal by the law of that country.¹ So an English Court will not, it seems, enforce a contract to be performed here if the performance is illegal by English law. In *Hope v. Hope*² an agreement was made in France for obtaining a divorce by collusion. The divorce proceedings were to take place in this country. In *Grell v. Levy*³ an agreement, also made in France, provided for the recovery, by an attorney practising in England, of a debt for his client half of which he was to retain for himself. In each case the English Court declined to enforce the agreement. It should be noted that in each case the agreement was to be performed in this country, and that the one involved an interference in the course of justice, while the other not merely contemplated champerty, but was made by an officer of the Courts of this country.

Thirdly, an English Court will not enforce a contract which, though valid by its proper law and by the law of the place where it is to be performed, offends against the distinctive policy of English law. The particular rule of public policy invoked must, however, be of an 'overriding' nature,⁴ for example, that which prohibits contracts which are sexually immoral, although there are more insular statements to the effect that any rule of public policy will suffice.⁵ A case which perhaps comes close to the edge of the doctrine is that of *Kaufman v. Gerson*:⁶

The husband of the defendant, living in France, had there misappropriated to his own use money entrusted to him by the plaintiff, and was liable to criminal proceedings by French law. The plaintiff threatened to prosecute, and the defendant promised to repay the money which had been misappropriated if he would refrain from the course which he threatened. Such an agreement was valid by French law.

The Court of Appeal nevertheless held that the money promised was not recoverable in this country because the moral pressure brought to bear upon the defendant to compromise proceedings which would have brought discredit on her husband conflicted 'with what are deemed to be in England

¹ *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287.

² (1857), 8 De G. M. & G. 731. ³ (1864), 16 C.B., N.S. 73.

⁴ Cheshire, *Private International Law* (5th ed.), p. 152.

⁵ *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, per Fry J. at p. 369.

⁶ [1904] 1 K.B. 591.

essential public or moral interests'. It seems unlikely, however, that a covenant in restraint of trade or a marriage brokerage contract would be so regarded.

III. THE SEVERABILITY OF AN ILLEGAL OR VOID CONTRACT¹

Severance of illegal or void conditions The same contract may contain both legal and illegal or void terms, and in such a case we have to consider whether the legal parts of the contract may be severed from the others and enforced, or whether the whole contract is bad.

History In the sixteenth and seventeenth centuries a number of cases arose which were concerned with the presence of illegal conditions in a deed or formal contract under seal. The generally accepted doctrine at the time was that the legal promises were not avoided merely because the promisor had made other promises in the same instrument which were illegal. This rule was said to find its chief support in a statement in Coke's Reports² that 'if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful; that in this case, the covenants or conditions which are against law are void *ab initio*, and the others stand good'. The Courts would merely disregard the illegal stipulations as surplus to the otherwise perfect deed.

Conditions in Deeds

Common law and statutory illegality

To this rule, however, there was an important exception. The judges, fearing lest statutes might be eluded, drew a distinction between illegality by statute and illegality at common law. They laid it down 'that the statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest'.³ If the object of the contract which it was sought to sever was prohibited by an Act of Parliament, the Courts would refuse to facilitate its performance in any way.

This distinction no longer exists, but the older principle by which conditions illegal at common law could be excluded from a deed forms the basis of the present-day doctrine of severability. In its modern form it was classically stated in the following terms by Willes J. in *Pickering v. Ilfracombe Railway Co.*:⁴

¹ See Marsh (1948), 64 L.Q.R. 230, 347, and (1953), 69 L.Q.R. 111; Gutteridge (1935), 51 L.Q.R. 104.

² *Henry Pigot's Case* (1614), 11 Co. Rep. 27b.

³ *Malvever v. Redshaw* (1669), 1 Mod. 35, *per* Twisden J.

⁴ (1868), L.R. 3 C.P. 235, at p. 237.

The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.

This passage does not, of course, indicate the circumstances in which we may, or may not, sever from one another the legal and illegal parts of the contract; not does it indicate that in the course of the late eighteenth century a new limitation came to be placed upon the doctrine—a limitation which has frequently been criticized, but for which there is still considerable judicial authority.¹ This is that if any part of the *consideration* for a promise is illegal, the promise cannot be enforced. If, for example, in consideration of the performance of two acts, one of which is lawful and the other unlawful, *A* promises *B* to pay him a single sum of money, the agreement cannot in whole or in part be enforced. The entire money consideration is rendered illegal by the illegal act for which, *inter alia*, it is to be a recompense, and the Court will not sever the illegal from the legal part of the consideration. Thus in *Hopkins v. Prescott*:²

No severance when any part of consideration illegal

The plaintiff agreed with the defendant (*a*) to sell him his business as a law stationer, distributor of stamps and collector of taxes, and (*b*) to introduce the defendant to two public offices. The defendant was to pay him in return the sum of £300.

It was held that promise (*b*) was illegal, having been expressly prohibited by statute, and that since there was but one consideration of £300 for both promises, it could not be severed so as to leave the rest of the agreement valid and enforceable. As Tindal C.J. put it in an earlier case:³ 'if either part of the consideration be illegal, the whole falls to the ground'.

At first sight, this limitation might seem to be not unreasonable, for it could be argued that to hold otherwise would be to force the parties to perform a contract which they would never have made. But it must be remembered that there are many degrees of illegality, ranging from those which involve some serious moral turpitude, such as an agreement to defraud the revenue or to let premises for the purposes of prostitution, to

but this test in practice unsatisfactory

¹ *Lound v. Grimwade* (1886), 39 Ch. D. 605; *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q.B. 700. Cf. *Bennett v. Bennett*, [1952] 1 K.B. 249, at pp. 252, 258, 260; *Bishop v. Kitchen* (1868), 38 L.J.Q.B. 20.

² (1847), 4 C.B. 578.

³ *Waite v. Jones* (1835), 1 Bing. N.C. 656, at p. 662.

those which are merely contrary to public policy, such as an agreement in restraint of trade or to oust the jurisdiction of the Courts. To apply the test of 'severability of consideration' as the sole test to all illegal contracts would produce some strange results:

Suppose that *A* promises *B* to pay him £50 if he will dig his garden, and in the same contract promises him another £50 if he will murder his wife.

As there is a separate consideration for each promise, they could be severed and the former stipulation could be enforced. On the other hand:

Suppose that *C & Co.* promise *D* to pay him a pension of £500 per year if he will convey to them his drapery business and in addition undertake not to compete with them for the rest of his life in any way whatsoever.

The second stipulation entered into by *D* is illegal as being in restraint of trade. It could not be severed, since there would be but one consideration to support both the legal and the illegal promises.

Again it has been pointed out¹ that the rule, if strictly applied, would mean that no unseverable contract which contained an illegal condition could ever be enforced. If one party made a promise to do something lawful, while the other promised to do two things one lawful and the other unlawful, neither could recover. The lawful promise, being given for a partly illegal consideration, would itself be tainted with illegality and rendered void. So, for example, if a contract of service contained an invalid covenant in restraint of trade the servant could not sue if he were wrongfully dismissed, nor could the master sue for breach of contract if still executory.²

Modern
tendency

A realization of these incongruities has led the Courts in recent years to turn away from the question whether or not the consideration can be severed, and to concentrate more distinctly upon the nature of the illegality involved. It appears that we should now differentiate between those promises which contain an element of moral turpitude ('illegal' conditions) and those which are merely discouraged by the law ('void' conditions). Although this distinction is itself not without its difficulties, it does, at any rate, take into account the

¹ Williston, *Contracts*, § 1782; Marsh (1948), 64 L.Q.R. 230, at p. 242.

² This is, of course, not the case: *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q.B. 706.

varying degrees of enthusiasm with which the judges are prepared to lend their aid to the enforcement of a contract containing an illegal stipulation. The consequences of illegality are, as we have seen, not uniform. Accordingly, we must separate illegal conditions into two general classes: (a) conditions which are strictly illegal, and (b) conditions which are merely void.

Conditions which are Strictly Illegal

Certain illegal conditions may be so grossly improper that the Courts will refuse to give effect to any contract in which they are contained. No question of severability can therefore arise. ^{'Illegal' conditions}

It would be convenient if it were possible to give a definitive list of such conditions, but the paucity of cases does not allow of any compilation. All that can be said is that, if a stipulation involves a serious element of moral turpitude—if, for example, it is one to commit murder or robbery, to defraud the revenue, or to promote future illicit cohabitation, it will so infect the rest of the contract that the Courts will refuse to recognize it in any way. Thus in *Napier v. National Business Agency, Ltd.*:¹

The plaintiff entered into a contract of service with the defendant by which it was agreed that he should be paid the sum of £13 a week as salary, and a further £6 per week for 'expenses'. In fact, his expenses were nowhere near that sum, and this further provision was merely a device to defraud the income tax authorities. He brought an action to recover his salary, abandoning his claim to the expense allowance.

The Court of Appeal held that the provision as to expenses was contrary to public policy. Its inclusion vitiated the whole agreement and no severance could be allowed. Similarly in *Kuenigl v. Donnersmark*,² where McNair J. was asked to sever certain clauses in an agreement which involved dealings with an alien enemy, he refused to do so for two reasons:³

First, that there is no authority for the proposition that for the purpose of the matter under consideration severance can ever take place and no ground of public policy which requires such severance. The decisions relating to severability of covenants in restraint of trade . . . seem to me to have no application at all in the present context. Secondly, that severance

¹ [1951] 2 All E.R. 264.

² [1955] 1 Q.B. 515; *Kenyon v. Darwen Manufacturing Co., Ltd.*, [1936] 2 K.B. 193.

³ At p. 537.

can only take place, if at all, if the part which it is sought to sever stands by itself supported by separate consideration. This is not the case here.

It is clear from this passage that McNair J. envisaged that there might be circumstances in which, if it were possible to sever the consideration, it might also be possible to sever the illegal from the legal conditions. Such might, for example, be the case where the illegal condition was prohibited by statute, and did not contain a serious element of moral turpitude.¹ But this does not affect the general rule that contracts which do possess this vitiating factor cannot be enforced in any way.

Conditions which are Merely Void

^{'Void'}
^{conditions} Certain other illegal conditions, though still offensive to public policy, are not illegal in the sense that they will taint any agreement in which they are contained. They are merely void and unenforceable.² Provided that certain requirements are satisfied, they may be severed from the rest of the agreement.

Examples of such conditions are mainly confined to covenants in restraint of trade, but agreements which oust the jurisdiction of the Courts have also been held to fall within this category. Their effect has been lucidly described by Denning L.J. in *Bennett v. Bennett*:³

The presence of a void covenant of this kind does not render the deed totally ineffective. . . . The party who is entitled to the benefit of the void covenant, or rather who would have been entitled to the benefit of it if it had been valid, can sue upon the other covenants of the deed which are in his favour; and he can even sue upon the void covenant, if he can sever the good from the bad, even to the extent of getting full liquidated damages for a breach of the good part. So also the other party, that is, the party who gave the void covenant and is not bound by its restraints, can himself sue upon the covenants in his favour, save only when the void covenant forms the whole, or substantially the whole, consideration for the deed.

We may refine this statement still further by pointing out that the cases in which severance of this type of condition has been allowed fall into two groups: (i) cases of true severance, and (ii) cases of one-sided severance.⁴

¹ *Hopkins v. Prescott* (*supra*) might be a case of this nature, for in 1847 the sale of a public office would not necessarily be regarded with moral disapprobation.

² *Bennett v. Bennett*, [1952] 1 K.B. 249, at p. 254.

³ [1952] 1 K.B. 249, at p. 260; *infra*, p. 336.

⁴ As suggested by Somervell L.J. in *Bennett v. Bennett*, [1952] 1 K.B. 249, at p. 253.

(i) *True severance*

If the illegal and legal conditions are distinct and separate, each being supported by its own consideration, the Court will strike out the offending conditions, leaving the others unimpaired.

Suppose that, in consideration of a promise not to apply to the Court for maintenance, a husband promises his wife to pay her £2 a week, and in the same agreement separately undertakes to pay her a further £2 if she will refrain from pledging his credit for necessities.

The first stipulation is void as being an attempt to oust the jurisdiction of the Courts. But it can be severed from the rest of the agreement, together with the consideration which supports it. It is truly and completely severed.

(ii) *One-sided severance*

In the case of one-sided severance, however, the Court strikes out some of the promises on one side, while leaving the consideration on the other side unaffected.

In *Goldsoll v. Goldman*,¹ for instance:

The defendant was the owner of a jeweller's business in New Bond Street, London. He sold the business to the plaintiff, who was also a jeweller, and covenanted that he would not for the period of two years 'either solely or jointly . . . carry on the business of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom . . . or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna.' The defendant joined a rival firm of jewellers in New Bond Street, and the plaintiff sought an injunction to restrain breach of the covenant.

The Court of Appeal held that, as the plaintiff's business was chiefly confined to imitation jewellery, the covenant was unreasonably wide, and that it was also too wide in area. However, the Court was prepared to strike out the words 'real or' and also the references to foreign countries, and to enforce the covenant as thus cut down. It did not, on the other hand, interfere with the consideration given for the covenant, and so the severance was on one side only.

Before severance can take place, however, certain requirements must first be satisfied. It must be stated that the formula-

¹ [1915] 1 Ch. 292; *Chesman v. Nainby* (1726), 2 Ld. Raym. 1456; *Puttsman v. Taylor*, [1927] 1 K.B. 637.

Requirements to be satisfied for severance

tion of these requirements has been the subject of much speculation and contradiction. At present, the situation would seem to be as follows:

- (i) The 'blue pencil' rule. In the first place, the illegal portion of the contract must be capable at least of being verbally separated from the remainder of the agreement. This is generally known as the 'blue pencil' rule, that is, 'severance can be effected when the part severed can be removed by running a blue pencil through it'¹ without affecting the meaning of the part remaining. The rule in practice may be seen in *Goldsoll v. Goldman* where the Court struck out the offensive words in the covenant. Also in *Rowbar Enterprises, Ltd. v. Green*:²

By a partnership agreement the plaintiff company and the defendant agreed to become partners in the running of a sporting newspaper. A clause in the agreement provided that if one partner should purchase the share of the other, the partner whose share was purchased should not 'for five years from such date directly or indirectly carry on or be engaged or interested in any business similar to or competing with the business of the partnership'. The plaintiff company in effect purchased the defendant's share, but the defendant subsequently started a rival newspaper of a similar nature.

The Court of Appeal held that the clause, as it stood, was too wide, as it was unlimited in point of area and would extend to any similar business in any part of the world. But it was possible to excise the words 'similar to or' and so to confine its operation to businesses competing with the partnership. In this form the covenant was unexceptionable and could be enforced.

- (ii) Illegal promise must not form main consideration. Secondly, the illegal promise must not form the whole or the main consideration for the contract. It must go only to a part, and a subsidiary part, of the consideration provided. In *Bennett v. Bennett*:³

A wife presented a petition for divorce against her husband in which she prayed for maintenance for herself and her son. Before the decree nisi she entered into a deed with her husband by which she covenanted not to apply to the Court for maintenance for herself or for her children, to maintain the younger son herself, and to indemnify her husband against

¹ *Attwood v. Lamont*, [1920] 3 K.B. 571, per Lord Sterndale M.R. at p. 578.

² [1954] 1 W.L.R. 815.

³ [1952] 1 K.B. 249. This decision has, however, been effectively reversed by the Maintenance Agreements Act, 1957 (5 & 6 Eliz. II, c. 35), s. 2, which provides that a covenant of this nature contained in a maintenance agreement shall not generally invalidate or render unenforceable any other financial arrangements contained therein.

any legal expenses arising out of the deed. The husband in his turn undertook to pay his wife and son an annuity, and to convey to her certain property. The husband failed to make the promised payments and was sued by his wife.

It was held that the covenant by the wife not to apply to the Court for maintenance was contrary to public policy and void. This, however, formed the main consideration for the contract, so that it could not be severed from the rest of the agreement. The wife was therefore unable to enforce her claim to the annuity since it was founded upon a consideration which was void. On the other hand, in *Goodinson v. Goodinson*:¹

A husband promised to pay his wife a weekly sum if she would indemnify him against any debts incurred by her, not pledge his credit for necessities, and forbear to bring any matrimonial proceedings against him.

He fell into arrear with the payments and was sued by her. It was held that there was ample consideration to support the agreement apart from the covenant not to sue, and so the husband was liable.

Thirdly, additional restrictions are placed on the doctrine of severability where it is sought to be invoked in relation to a master-servant covenant in restraint of trade. As we have already seen, the law dislikes such agreements and will be jealous to see that freedom of contract is not abused. Covenants, therefore, which, if inserted in a vendor-purchaser agreement, would freely be severed, will not receive such favourable treatment if imposed on an employee. The excess which it is sought to delete must be 'merely trivial'. This was insisted upon by Lord Moulton in *Mason v. Provident Clothing and Supply Co.*:²

(iii) in master-servant contracts

Illegal condition must be 'merely trivial'

I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of *trivial importance, or merely technical, and not a part of the main purport and substance of the clause*. It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of

¹ [1954] 2 Q.B. 118.

² [1913] A.C. 724, at p. 745. Cf. *Nevean & Co. v. Walker*, [1914] 1 Ch. 413.

what he might have validly required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master.

Moreover there is some authority for the proposition that in a master-servant covenant, it is also necessary to show that 'the and not a single covenant covenant is not really a single covenant but is in effect a combination of several distinct covenants'.¹ This test was put forward in *Attwood v. Lamont*:²

The plaintiff was the proprietor of a general outfitter's business. It contained many different departments, and in one of these (the tailoring department) the defendant had been employed as a tailor and cutter. He was not concerned with any of the other departments. In his contract of service he had bound himself, after the termination of his employment, not to be concerned in the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies', or children's outfitter within ten miles of his employer's place of business at Kidderminster.

The Court of Appeal held that this covenant was too wide. It attempted to protect against competition all branches of the employer's business, and not merely the tailoring trade in which the defendant had been employed. The Divisional Court had, however, found that the covenant was severable by striking out the other trades except that of tailor. The Court of Appeal reversed this finding. Both Lord Sterndale M.R. and Younger J. accepted the test of asking whether the covenant could be considered as being in effect a number of separate covenants,³ and the latter said:⁴

Now, here, I think, there is in truth but one covenant for the protection of the respondent's entire business, and not several covenants for the protection of his several businesses. The respondent is, on the evidence, not carrying on several businesses but one business, and, in my opinion, this covenant must stand or fall in its unaltered form.

The logic of this passage is not entirely acceptable, and it is a matter for regret that Younger J. did not confine himself to pointing out that the Courts are extremely reluctant to sever a master-servant covenant, rather than saddle the law with this difficult and elusive test.

¹ *Attwood v. Lamont*, [1920] 3 K.B. 571, per Younger J. at p. 593.

² [1920] 3 K.B. 571. Cf. *Putsman v. Taylor*, [1927] 1 K.B. 637.

³ They differed, however, as to how this test should be applied.

⁴ At p. 593. See also *Roush v. Jones*, [1947] 1 All E.R. 179, 758.

PART III
LIMITS OF THE CONTRACTUAL
OBLIGATION

CHAPTER X. PRIVACY OF CONTRACT

CHAPTER XI. ASSIGNMENT AND NEGOTIABILITY

CHAPTER X

PRIVITY OF CONTRACT

WE come now to deal with the effects of a valid contract when formed, and to ask, To whom does the obligation extend? What are the limits of a contractual agreement? This question must be considered under two separate headings: (1) the imposition of liabilities upon a third party, and (2) the acquisition of rights by a third party. We shall see that the general rule of the common law is that no one but the parties to a contract can be bound by it, or entitled under it. This principle is known as that of *privity of contract*.

Scope of the obligation

I. THE IMPOSITION OF CONTRACTUAL LIABILITIES UPON THIRD PARTIES

Two persons cannot, by any contract into which they may enter, thereby impose liabilities upon a third party.

Contract cannot impose liability upon a third party

This is a rule of general application, but it has derived its most cogent illustration from attempts to impose conditions on the resale of goods for the purpose of maintaining their price. In *McGruther v. Pitcher*,¹ for example:

The plaintiff was the licensee of the owner of a patent. He manufactured articles under his licence, and pasted inside the lid of each box in which the article was sold a printed slip, stating that it was a condition of the sale that the article was not to be resold at less than a specified price, and that 'acceptance of the goods by any purchaser will be deemed to be an acknowledgement that they are sold to him on these conditions and that he agrees with the vendors to be bound by the same'. A purchaser of the articles from a wholesale agent of the plaintiff retailed them at less than the specified price, and the plaintiff sought to restrain him from so doing.

It was held that the action failed, because the plaintiff could not show that any contract existed between himself and the retailer.

The plaintiff in *McGruther v. Pitcher* was not a patentee claiming an injunction to restrain an infringement of his patent,² but merely a person who had a licence to manufacture and sell a patented article. It was therefore necessary for him to

¹ [1904] 2 Ch. 306; *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; *Clare v. Theatrical Properties, Ltd.*, [1936] 3 All E.R. 483.

² Patents and Designs Act, 1949 (12, 13 & 14 Geo. VI, c. 62), s. 57.

rely on the ground that he had purported to attach a condition to the resale of goods, and that the defendant knew of this condition when he bought them. But, as was said by Romer L.J.:¹

A vendor cannot in that way enforce a condition on the sale of his goods out and out, and, by printing the so-called condition upon some part of the goods or on the case containing them, say that every subsequent purchaser of the goods is bound to comply with the condition, so that if he does not comply with the condition he can be sued by the original vendor. That is clearly wrong. You cannot in that way make conditions' run with the goods.

A patentee has by statute the sole right to make, use, exercise, and vend his invention; and no other person has a right to sell the patented article except under licence from him, and subject to any conditions he may have attached to the licence. 'Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods.'²

Apart, then, from the special case of the owner of a patent, it is not generally possible at common law for two parties to a contract for the sale of goods to impose liabilities in the shape of restrictive conditions upon a third person into whose hands the goods subsequently come. This is so whether or not he had notice of the conditions, and whether he took the goods gratuitously or for value. The general principle of privity of contract supervenes.

Contracts
concerning
land

But where contracts concerning land are concerned, somewhat different rules prevail. If *A* leases land to *B*, *B*'s lease is enforceable by and against subsequent purchasers of the reversion, even though they were not parties to the original contract.³ Also, under the principle of equity known as the rule in *Tulk v. Moxhay*,⁴ it is possible for a vendor of freehold land to attach to the land restrictive covenants as to its user which will bind all subsequent owners who take with notice of the covenants.⁵ In such a case, however, the vendor or his assignees must retain in the vicinity land capable of being benefited by

¹ [1904] 2 Ch. 306, at p. 311.

² *Ibid.*, per Cozens-Hardy L.J. at p. 312.

³ *Spencer's Case* (1583), 5 Co. Rep. 16a; Law of Property Act, 1925 (15 & 16 Geo. V, c. 20) ss. 141, 142.

⁴ (1848), 2 Ph. 774.

⁵ Such covenants must now be registered under the Land Charges Act, 1925 (15 & 16 Geo. V, c. 22).

the observance of the covenants; they must have a permanent interest in their enforcement.¹

In *Lord Strathcona Steamship Co., Ltd. v Dominion Coal Co., Ltd.*,² the Judicial Committee of the Privy Council applied the same principle to a chattel: *The Lord Strathcona S.S. Co.*

The respondents, the Dominion Coal Co., had a long term time charter-party of a ship. The owners sold the ship, which eventually came into the possession of the appellants, the Lord Strathcona Steamship Co., who took it with notice of the charter-party and on the understanding that the agreement with the respondents should be honoured. In fact, they did not honour the agreement, and, when sued by the charterers, pleaded that they were not bound by the charter-party as there was no privity of contract between them.

It was held that the decision of the Courts in Nova Scotia granting the respondents an injunction to restrain acts inconsistent with the charter-party should be affirmed. The Judicial Committee relied upon the following *dictum* of Knight Bruce L.J. in *De Mattos v. Gibson*:³

Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

They pointed out that 'this is not a mere case of notice of the existence of a covenant affecting the use of property sold, but it is the case of the acceptance of their property expressly *sub conditione*'.⁴ The case, it was said, fell under the doctrine long ago established with regard to the user of land by the case of *Tulk v. Moxhay*, and that whether the subject-matter be land or a chattel, the principle is the same: 'the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired'.⁵ The purchasers were in the position of 'constructive trustees'⁶ with

¹ *London County Council v. Allen*, [1914] 3 K.B. 642.

² [1926] A.C. 108.

³ (1858), 4 De G. & J. 276, at p. 282.

⁴ At p. 116.

⁵ *Ibid.*, at p. 119.

⁶ This description should not be taken too literally. Although there may be situations where the purchaser of a vessel could be considered to have become the trustee of a contractual right on behalf of the charterer (*viz. infra*, p. 350), this does not seem to have been the *ratio decidendi* of the case. See *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 2 Q.B. 146.

obligations which a Court of Equity would not permit them to violate.

Criticisms This case has, however, been the subject of considerable criticism,¹ and it has even been said that it was wrongly decided.² In the first place, it is argued that the *dictum* of Knight Bruce L.J. in *De Mattos v. Gibson* is of little authority. In that case, an interlocutory injunction was granted by the Lords Justices of Appeal in Chancery to restrain the mortgagee of a ship, who had acquired his mortgage with knowledge of an existing voyage charter-party, from interfering with the performance of the charter. The reasoning of Knight Bruce L.J. did not, however, form part of the concurring judgment of Turner L.J. And when the case came on for trial before Lord Chelmsford L.C.,³ a final injunction was refused, and the Lord Chancellor expressed the opinion that any right to an injunction was based on an extension of the principle in *Lumley v. Gye*⁴ whereby a person who actively induces another to break his contract with a third party is liable to the third party in tort in respect of any loss which he may have suffered by the breach.

Secondly, it is contended that, in so far as the Judicial Committee in the *Strathcona Case* drew an analogy between the principle enunciated by Knight Bruce L.J. and the rule in *Tulk v. Moxhay* relating to land, this too will not bear examination. It has been noted above that the *Tulk v. Moxhay* rule is not dependent upon notice of the restrictive covenant alone, but also upon the presence of a continuing interest in the property sold. But what interest has a charterer under a voyage or time charter-party (even if of long duration as in the *Strathcona* case) in the subject-matter of the sale, the ship? All he has is a personal right that the shipowner should continue to use the ship to perform the services which he has covenanted to perform. The charterer has no proprietary or possessory interest in the vessel.⁵ Moreover, if the *dictum* of Knight Bruce L.J. were indiscriminately applied, it would be possible to impose incumbrances by way of contract on

¹ *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234, at p. 239.

² *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 2 Q.B. 146, at p. 168.

³ (1859), 4 De G. & J. 288.

⁴ (1853), 2 E. & B. 216. See also Wade (1926), 42 L.Q.R. 139, and *The Lord Strathcona*, [1925] P. 143.

⁵ *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 2 Q.B. 146, per Diplock J. at p. 166.

chattels generally,—a course against which the common law has always set its face.

These arguments are compelling, but there is something to be said on the other side. First, notwithstanding the different basis of his decision, Lord Chelmsford says in *De Mattos v. Gibson*:¹ and reply

It is true that he took his mortgage with full knowledge of the charter, and that he must therefore abstain from any act which would have the immediate effect of preventing its performance.

This is still, it seems, the law regarding the mortgage of ships:² thus the general principle that an injunction will be granted remains unimpaired. Secondly, the analogy with *Tulk v. Moxhay* is, at the most, only an analogy; and, in any case, the Judicial Committee evidently considered that the interest which a charterer has in the performance of his charter is quite unique.³ Finally, there is no need to suppose that the principle applies to chattels generally. Since as Lord Chelmsford pointed out, a ship is 'a chattel of peculiar value to the charterer',⁴ the rule may be confined to 'the very special case of a ship under charter-party'.⁵

The *Strathcona Case*, then, it is submitted, was rightly decided. But what of its scope? In *Port Line, Ltd. v. Ben Line Steamers, Ltd.*,⁶ Diplock J. defined its limits: Limits of the decision

The M/V *Port Stephens* was chartered to the plaintiffs by its owners, Silver Line Ltd., on a gross time charter for thirty months from March, 1955. In February, 1956, Silver Line sold the vessel to the defendants, it being agreed that the defendants should immediately charter the ship back to Silver Line by demise in order that they might fulfil their contract with the plaintiffs. Unfortunately, this second charter-party contained the term that 'If the ship be requisitioned this charter shall thereupon cease', although no such clause appeared in the original time charter-party. The defendants were unaware of this disparity. In August 1956 the ship was requisitioned by the Crown, and as a result the plaintiffs lost the use of the vessel. Their claim against Silver Line was settled, but they now brought an action against the defendants to recover the whole or part of the compensation received by the defendants from the Crown in respect of the period of requisition.

¹ (1859), 4 De G. & J. 288, at p. 299.

² *De Mattos v. Gibson* (*supra*); *Messageries Impariales v. Baines* (1863), 7 L.T. 763; *The Lord Strathcona*, [1925] P. 143; *Lorentzen v. White Shipping Co., Ltd.* (1943), 74 Ll.L.R. 161. ³ [1926] A.C. 108, at p. 123.

⁴ (1859), 4 De G. & J. 288, at p. 299.

⁵ *Clore v. Theatrical Properties, Ltd.*, [1936] 3 All E.R. 483, *per* Lord Wright M.R. at p. 490. ⁶ [1958] 2 Q.B. 146.

Diplock J. held that, even if the *Strathcona Case* were rightly decided, the plaintiffs could not bring their claim within its principles, as the defendants had no knowledge at the time of their purchase of the plaintiffs' rights under the time charter. Moreover, he considered that, even if notice had been shown, (a) the defendants were in no breach of duty to the plaintiffs since it was by no act of theirs that the vessel during the period of requisition was used inconsistently with the terms of the plaintiffs' charter—it was by act of the Crown by title paramount—and (b) the plaintiffs were not entitled to any remedy against the defendants except a right to restrain the defendants from using the vessel in a manner inconsistent with the terms of the charter.

The principle in the *Strathcona Case* is thus limited in scope. It only applies where there is actual knowledge by the subsequent purchaser at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain.¹ Constructive notice is insufficient.² The charterer's only remedy is by way of injunction;³ he cannot obtain specific performance of the contract,⁴ nor can he get damages,⁵ unless, possibly, the purchaser actively induces the vendor to repudiate the charter.⁶ It would also seem that the Court will not be prepared to grant an injunction if the situation is such that, in any case, the original party to the contract was incapable of further performance of the charter-party,⁷ or if, in the case of the mortgage of a vessel, the charter is such as substantially to impair the security.⁸

In so far, then, that the *Strathcona Case* purported to lay down any general principle regarding a 'lease' of chattels, or the imposition of contractual burdens on third parties, it would certainly not be followed.⁹ Recently, however, the

¹ [1958] 2 Q.B. 146, at p. 168.

² The doctrine of constructive notice does not apply to chattels (*Joseph v. Lyons* (1884), 15 Q.B.D. 280, at p. 287) nor to the contents of documents in commercial transactions (*Manchester Trust v. Furness*, [1895] 2 Q.B. 539, at p. 545).

³ *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 2 Q.B. 146, per Diplock J. at p. 167.

⁴ *De Mattos v. Gibson* (1859), 4 De G & J. 288, at p. 297; for this would be a contract which would require constant supervision by the Court.

⁵ This is apparent from the form of the order made in the *Strathcona Case*.

⁶ *British Motor Trade Association v. Salvadori*, [1949] Ch. 556.

⁷ *The Lord Strathcona*, [1925] P. 143.

⁸ *The Celtic King*, [1894] P. 175.

⁹ *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234, at p. 239.

legislature has seen fit to alter the common law rules on this topic. The Restrictive Trade Practices Act, 1956,¹ prohibits the collective enforcement of resale price maintenance, but allows it at the instance of individual suppliers. In section 25 (1) of the Act it is enacted:

Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may . . . be enforced by the supplier against any person not party to the sale who subsequently acquires the goods *with notice of the condition* as if he had been party thereto.

Express notice of the condition must be given to the person who acquires the goods,² but, if this is done, he will be bound, and the Court may grant an injunction to restrain any further breaches of condition on his part,³ in addition to any other relief to which the supplier may be entitled. This provision is, however, limited to conditions as to price, and it is still not possible to impose conditions as to the use of the goods sold.

Other exceptions include patents (as mentioned above),⁴ copyright,⁵ and certain other interests affecting land, such as easements,⁶ occupational licences,⁷ and options to purchase.⁸

II. THE ACQUISITION OF CONTRACTUAL RIGHTS BY THIRD PARTIES⁹

It is contrary to the common sense of mankind that *C*, a third party, should be bound by a contract made between *A* and *B*. But if *A* and *B* make a contract in which *B* promises to do something for the benefit of *C*, all three may be willing that *C* should have all the rights of an actual contracting party; and there would be nothing startling if the law should give effect to this desire. In many systems of law, indeed, this is the rule. It is not, however, the rule of the English common law.

¹ 4 & 5 Eliz. II, c. 68.

² *County Laboratories, Ltd. v. F. Mindel, Ltd.*, [1957] Ch. 295.

³ S. 25 (4).

⁴ *Columbia Gramophone Co. v. Murray* (1922), 39 R.P.C. 239.

⁵ Copyright Act, 1956 (4 & 5 Eliz. II, c. 74).

⁶ Land Charges Act, 1925 (15 Geo. V, c. 22), s. 10.

⁷ *Errington v. Errington*, [1952] 1 K.B. 290; *Bendall v. McWhirter*, [1952] 2 Q.B. 466.

⁸ Land Charges Act, 1925 (15 Geo. V, c. 22), s. 10.

⁹ See generally Dowrick (1956), 19 Mod. L.R. 374.

In *Price v. Easton*:¹

W.P. was indebted to Price in the sum of £13. He promised one Easton to work for him, and in return Easton undertook to discharge the debt to Price. The work was done by W.P., but Easton did not pay the money to Price. Price sued Easton.

It was held that Price could not recover because he was not a party to the contract. The judges of the Queen's Bench stated in different forms the same reason for their decision. Lord Denman C.J. said that the plaintiff did not 'shew any consideration for the promise moving from him to the defendant'.² Littledale J. said 'No privity is shewn between the plaintiff and the defendant';³ Taunton J. that it was 'consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between W.P. and the defendant';⁴ and Patteson J. that there was 'no promise to the plaintiff alleged'.⁵

Blood relationship
It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him,⁶ but the case of *Tweddle v. Atkinson*,⁷ already cited in the chapter on Consideration, is conclusive against this view:

not now
sufficient

M and *N* married, and after the marriage a contract was entered into between *A* and *X* their respective fathers, that each should pay a sum of money to *M*, and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him.

It was held that no action would lie. Wightman J. said:⁸

Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*,⁹ in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

¹ (1833), 4 B. & Ad. 433; *Crow v. Rogers* (1724), 1 Stra. 592.

² At p. 434.

³ At p. 434.

⁴ At p. 435.

⁵ At p. 435.

⁶ *Dutton v. Poole* (1678), 2 Lev. 211.

⁷ (1861), 1 B. & S. 393; *supra*, p. 86. For a note on the historical validity of this decision, see (1954), 70 L.Q.R. 467.

⁸ At p. 397.

⁹ (1679), 1 Vent. 6.

The rule was thus restated in modern times by Lord Haldane in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*:¹

In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.

This case, like that of *McGruther v. Pitcher*,² arose out of a price maintenance agreement, but with this difference: it was not a case of a manufacturer seeking to impose conditions on a retailer who had entered into no contractual relationship with him, but of a retailer binding himself by contract to observe the conditions for the benefit of a third party, the manufacturer:

The plaintiffs were manufacturers of motor-car tyres. They sold to a firm of factors, Messrs. Dew & Co., a number of tyres on the understanding that they should not be sold under a certain price. The defendants bought some of these tyres from Dew & Co. and, in the contract of sale, bound themselves to observe the conditions as to price; they further promised that they would pay £5 by way of damages to the plaintiffs for every tyre sold, or offered for sale, in breach of this undertaking. They sold some of the tyres for sums below the stipulated price.

The plaintiffs, faced with the fact that they were strangers to the contract between the defendants and Dew & Co. and thus could not take any benefit under it, sought to establish that Dew & Co. had entered into the contract as their agents and on their behalf. But the House of Lords held that, even if the terms of the contract were consistent with that construction, the plaintiffs would still be unable to enforce it, since no consideration had moved from them to the defendants.

These cases might seem to depend simply and solely on the rule that consideration must move from the promisee. But they also rest upon the more fundamental assumption that no one who is not a party to a contract can sue on it.³ The legal effects of a contract are confined to the contracting parties, and the *vinculum juris* is personal to them. Although this principle has been criticized quite recently as a nineteenth-century innovation,⁴ there is little doubt that it forms a basic proposition of

Relation-
ship with
doctrine of
considera-
tion

¹ [1915] A.C. 847, at p. 853.

² [1904] 2 Ch. 306; *supra*, p. 341.

³ Law Revision Committee, Sixth Interim Report, 1937 (Cmd. 5449), § 37.

⁴ *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1954] 1 Q.B. 250, *per* Denning L.J. at p. 273. Cf. (1954), 70 L.Q.R. 467.

English law and cannot, at this late stage, be successfully contested.

There are, however, a number of exceptions to the rule,¹ and it is the nature and extent of these which may more legitimately be the subject of discussion.

Trusts of Contractual Rights

Equitable doctrine of trust of contractual right In the passage which has already been cited from Lord Haldane's judgment in *Dunlop v. Selfridge*,² it will be observed that he points out that, while a *jus quaesitum tertio* cannot arise by way of contract, it may be conferred by way of property under a trust. We must consider, therefore, how far the strict rule of the common law is qualified by the equitable doctrine to which Lord Haldane refers.

The doctrine is that a party to the contract, either at the time when he enters into it or thereafter, may constitute a trust of the right to which he is entitled under the contract, in favour of a third party.³ By so doing he confers on the third party a right which is enforceable in equity. Such a right arises, in Lord Haldane's phrase, 'by way of property', because, like the right of any other cestui que trust, it is a right in equity to the *res* or property which is the subject of the trust, the *res* in this case being the contractual right, which at law is vested in the trustee, that is to say, in the party to the contract. It does not arise 'by way of contract' because the third party's right is not a right to enforce the contract directly, but a right to enforce the trust in his favour; and, as with the enforcement of equitable rights in general, the person having the legal right in the thing demanded, in this case the contracting party who has constituted himself a trustee, must in general be a party to the action.⁴ 'The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as defendant.'⁵

¹ Scamell, [1955] *Current Legal Problems*, 131; Dowrick (1956), 19 Mod. L.R. 374.

² [1915] A.C. 847; *supra*, p. 349.

³ See Corbin (1902), 15 Harvard L.R. 767; Corbin (1930), 46 L.Q.R. 12; Glanville Williams (1944), 7 Mod. L.R. 123; Law Revision Committee, Sixth Interim Report, 1937 (Cmd. 5449), § 42.

⁴ *Performing Rights Society v. London Theatre of Varieties, Ltd.*, [1924] A.C. 1, at p. 14.

⁵ *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70, at p. 79.

This equitable doctrine was first enunciated by Lord Hardwicke in *Tomlinson v. Gill*:¹ Its enunciation

J.G. died intestate. The defendant, Robert Gill, promised the deceased's widow, Catherine, that if she would allow him to be joined with her in letters of administration to be issued in respect of her husband's estate, he would make good any deficiencies of assets to pay debts. Accordingly, joint administration was taken out, and action was taken by the deceased's creditors to enforce the undertaking which the defendant had given.

It was held that the creditors were entitled to the benefit of the contract made, since the widow had entered into it as trustee for them.

It was applied by the House of Lords in *Les Affréteurs Réunis Société Anonyme v. Walford, Ltd.*:² application

In a charter-party made between the defendants, owners of a steamship, and a firm of charterers, the defendants promised to pay a commission of 3% on the gross amount of hire to the plaintiff, the broker who had negotiated the contract of charter-party. They failed to pay, and the plaintiff sued them to obtain his commission.

The plaintiff was not a party to the contract, and so would not normally be entitled to any rights under it. But it was the practice for the charterer, if necessary, to sue the shipowner for the amount of the broker's commission *as trustee for the broker*. In the present case the action had been brought by the broker himself, but by consent it was treated as brought by the charterers as trustees for him. The House of Lords recognized the practice and gave judgment in his favour.

If the trustee sues on behalf of the third party, he may recover not merely nominal damages representing his own meagre interest in the performance of the contract, but the whole loss suffered by the beneficiary. In *Lloyd's v. Harper*:³

A father whose son was about to be elected a member of Lloyd's wrote to the committee guaranteeing his son's solvency. His son became insolvent, whereupon Lloyd's claimed against the father on behalf of those of its members who had suffered thereby, and also on behalf of some outsiders.

It was held that they were entitled to judgment for the whole sum covered by the guarantee as they were trustees of the

¹ (1756), Amb. 330; *Gregory v. Williams* (1817), 3 Mer. 582; *Fletcher v. Fletcher* (1844), 4 Hare 67; *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *Royal Exchange Assurance v. Hope*, [1928] Ch. 179; *Harmer v. Armstrong*, [1934] Ch. 65.

² [1919] A.C. 801.

³ (1880), 16 Ch. D. 290.

guarantee on behalf of all those who had suffered by the insolvency of the son.

limits The real difficulty about such a trust is to find a test whereby it may be ascertained whether one of the parties has entered into the contract as trustee; it is not easy to define the circumstances in which the doctrine will be applied. No special form of words is necessary to constitute a trust of a contractual right, but the intention to constitute the trust must be affirmatively proved.¹ Unfortunately, however, when a person enters into a contract for the benefit of a third party, he rarely, if ever, stops to consider whether he intends to create a right arising by way of contract alone, or one arising by way of property under a trust. Even the judges themselves have found it difficult enough to decide in any individual case, and their decisions have consequently a rather capricious air. In *Re Flavell*,² for example:

Partnership articles provided that, in the event of the death of one of the partners, his widow should be entitled to the payment of an annuity out of the firm's net profits each year.

It was held that the executors of the deceased partner were trustees for the widow under this contract, and that she was entitled to be paid the promised sums. But in *Re Schebsman*:³

S. was employed by a Swiss company. In 1940 his employment was terminated, and, in consideration of his retirement, the company agreed to pay him the sum of £5,500 by instalments. If he died before the completion of the payments to him, they were to be paid to his widow and daughter. In March 1952 S. became bankrupt, and in May of the same year he died. His trustee in bankruptcy claimed to intercept the sums being paid to his widow, on the ground that S. himself could have intercepted them, and so they were available for the satisfaction of his creditors.

The Court refused to hold that the contract created a trust in favour of the widow and daughter; they had therefore no enforceable right to the money.⁴ But the company was free to perform its obligation if it so wished, and, if it did so, neither

¹ *Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70.

² (1883), 25 Ch. D. 89.

³ [1944] Ch. 83; *Re Miller's Agreement*, [1947] Ch. 615.

⁴ The question whether or not any trust had been created, seems, however, to be *obiter*.

S. nor his trustee in bankruptcy could intercept the money and put it in his own pocket. Accordingly the claim failed.

This latter case shows two things. First, that even where no trust is created, any attempt by one party to appropriate to himself the performance properly due to the third party will constitute a breach of contract by him. Secondly, the Courts are reluctant to employ the trust concept to mitigate the rigour of the doctrine of privity of contract, unless there is some substantial evidence that the parties intended to create a trust. In *Vandepitte v. Preferred Accident Insurance Corporation of New York*,¹ for example:

B. insured his car with the defendant company. The contract of insurance was stated to cover not only B. himself, but all persons driving the car with his consent. B.'s daughter, while driving it with his consent, knocked down and injured the plaintiff, Vandepitte. She was successfully sued in negligence by Vandepitte, but the judgment was unsatisfied. By an Act of the legislature of British Columbia, an injured person could, in such circumstances, avail himself of any rights possessed by the driver of the vehicle against the insurance company. Vandepitte therefore brought an action against the defendant company under this Act.

In order to succeed, he had to establish that the daughter had some rights against the company under the policy, and he could only do this by showing that a trust had been created for her benefit. The Judicial Committee were not satisfied that such was the intention of the contracting parties, and so his claim failed.

It is clear that this equitable doctrine does create an exception to the common law rule by which a contract can only be enforced by one who is a party to it. But it is not a very satisfactory device as the circumstances in which it will be applied cannot be predicted with any certainty.² One learned writer has contended that the decisions show that 'the device of a trust can be made equally successful by fiction in cases where the contracting parties do not expressly adopt it, use no such words as trust and trustee, and are not even conscious of the existence of such concepts'.³ But from that point of view the procedure is unnecessarily cumbrous,⁴ and, moreover, the presence of a trust will render the contract immutable where the parties

¹ [1933] A.C. 70. Cf. *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] 2 K.B. 282.

² Glanville Williams (1944), 7 Mod. L.R. 123.

³ Corbin (1930), 46 L.Q.R. 12, at p. 17.

⁴ Lord Wright (1939), 55 L.Q.R. 208 describes it as 'a cumbrous fiction'.

might otherwise wish to be free to vary it.¹ In *Re Schebsman*, cited above, Du Parcq L.J. said:²

It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's lifetime injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable.

The conclusion which may be drawn is that the Courts no longer favour the device of the trust of a contractual right, and that it does not now constitute a major exception to the doctrine of privity of contract.

Contracts of Insurance

Contracts of Insurance Contracts of insurance are often made in favour of third parties and the legislature has intervened to ensure that these may be enforced by them.

Road Traffic Act Under the Road Traffic Act, 1930, section 36 (4),³ the person issuing a policy of insurance against third party risks in accordance with the requirements of the Act is made liable to indemnify not only the person taking out the policy, but 'the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover'. This means that the driver of a motor vehicle is entitled to the benefit of an insurance policy made with a company by the owner of the vehicle and which purports to cover the driver.

Husband and wife The Married Women's Property Act, 1882, section 11,⁴ allows a husband to effect an insurance on his life for the benefit of his wife and children. A wife, too, may effect an insurance on her own life for the benefit of her husband, and upon her husband's life for her own benefit. Such an insurance creates a

¹ Another serious objection is that 'Equity will not assist a volunteer'. Unless the trust is complete and perfect, equity will not come to the aid of those who have not furnished valuable consideration, or who do not come within a marriage consideration (*Re d'Angibau* (1880), 15 Ch. D. 228). Thus we have to suppose either that the trust is complete and perfect where it is one of a chose in action (see *Fletcher v. Fletcher* (1844), 4 Hare 67), or that this type of trust forms an exception to the general rule.

² [1944] Ch. 83, at p. 104.

³ 20 & 21 Geo. V, c. 25.

⁴ 45 & 46 Vict., c. 75.

trust in favour of the objects of the policy, and does not form part of the assured's estate.

In contracts of marine insurance, when the policy is taken out on behalf of those to whom the property insured 'doth, may or shall appertain', then the owner, even if he is not an original party to the contract, may enjoy rights under it.¹ Marine Insurance

Similarly in the case of sales of land, if *A* contracts to sell land to *B* and property on the land is damaged or destroyed before the completion of the sale, any insurance moneys received by *A* must be held by him on behalf of *B*.² It is also said that this principle applies to the sale of goods, but the buyer in this case must show that the seller intended that the policy should be taken out for his benefit.³ Land and goods

Commercial Practice

Certain exceptions have been introduced into the doctrine of privity of contract as concessions to commercial practice. Some of these are the result of statutory provisions; others arise out of the agreed practices of merchants as recognized by the Courts. The boundaries of this latter class are not very clearly defined, but two main categories seem to exist. Commercial exceptions

The first of these concerns the carriage of goods by sea. *A* consignee of goods named in a bill of lading, and every indorsee of the bill, has the same right, and is subject to the same liabilities as the original party to the contract of carriage.⁴ If the bill of lading contains exemption clauses, these may be made to extend to third parties engaged in carrying out the services provided for by the contract, and not merely to the carrier personally.⁵ Such contracts were considered in even wider terms by Devlin J. in *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.*:⁶ (i) Carriage of goods by sea

The plaintiffs sold to I.S.D. in India certain goods 'f.o.b. London'. The defendants agreed with I.S.D. to carry the goods by sea to India. A bill of lading, incorporating the Hague Rules containing a clause

¹ Marine Insurance Act, 1906 (6 Edw. VII, c. 41), s. 14 (2). In non-marine insurance the use of the same words may produce an identical result: *Waters v. Monarch Fire and Life Assurance Co.* (1856), 5 E. & B. 870; *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.*, [1954] 2 Q.B. 402, at pp. 422, 423.

² Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), s. 47 (1).

³ *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436, at p. 454.

⁴ Bills of Lading Act, 1855 (18 & 19 Vict., c. 111), s. 1; *infra*, p. 388.

⁵ *Elder Dempster & Co., Ltd. v. Paterson, Zochonis & Co., Ltd.*, [1924] A.C. 522; *supra*, p. 160. Contrast *Adler v. Dickson*, [1955] 1 Q.B. 158 (carriage of passenger by sea) and *Cosgrove v. Horsfall* (1945), 62 T.L.R. 140 (carriage of passenger by land); *supra*, pp. 161, 159.

⁶ [1954] 2 Q.B. 402.

limiting liability on behalf of the carriers was issued in pursuance of this agreement. By this clause, the defendants' liability was limited to £200. Owing to the negligence of the defendants, the goods were damaged. Since the plaintiffs had agreed with I.S.D. that the goods were to be at their risk, they made good the damage and sued the defendants for the loss, which amounted to more than £900.

The defendants admitted their liability, but pleaded that they were entitled as against the plaintiffs to the benefit of the limitation clause contained in the bill of lading. The plaintiffs contended that they could not claim this, as they (the plaintiffs) were not parties to the bill of lading, and so not bound by its terms. Devlin J. held that they were bound. It was clearly the intention of all three parties that the plaintiffs should participate in the contract of affreightment so far as it affected them, and, being entitled to the benefits, they had also to accept the liabilities. A wider principle was also laid down that, where the property in goods is likely to be transferred during the course of a contract concerning them, 'the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes'.¹

(ii) Bankers'
Commercial
Credit International trade has introduced another exception to the doctrine of privity of contract. This is the operation of the device known as the Bankers' Commercial Credit.² Its purpose is to finance contracts for the sale of goods between buyers and sellers in different countries, and particularly where the delay between despatch from the place of manufacture and arrival at the destination is a considerable one. In order that the seller may be sure of the solvency of the buyer, and so that long term credit facilities may be made available, it is customary for the buyer to make an arrangement with his banker (usually described as the originating banker) whereby the banker undertakes to meet bills of exchange drawn on him in respect of the contemplated contract. The banker then advises the seller, or his bank, that it has opened an irrevocable credit in his favour, so that the seller will now be able to despatch the goods in the firm knowledge that he will ultimately be paid for them. In order to protect himself, the banker normally insists that bills of exchange will only be met if accompanied by the shipping documents, which, being the symbol of the goods

¹ [1954] 2 Q.B., 402, at p. 426. The analogy with s. 14 (2) of the Marine Insurance Act, 1906 (6 Edw. VII, c. 41) is clear. *Viz. supra*, p. 355.

² See Gutteridge, *The Law of Bankers' Commercial Credits*.

themselves,¹ provide him with some security for the loans made.

The Bankers' Commercial Credit does not fit easily into the common law pattern of privity of contract.² If the buyer should become insolvent, or if for some other reason the bank should refuse to honour its obligation, what would be the position of the seller? Since he is a third party to the contract made between the buyer and the banker, he would not be able to sue on it.³ In practice, however, no bank will revoke a credit which is stated to be irrevocable, and so the question is unlikely to arise.⁴

Negotiable instruments provide another important, but statutory, exception to the doctrine, but since these are fully dealt with in the section devoted to them later in this book,⁵ it is not necessary to elaborate their effect here.

Contracts concerning Land

We have already seen that, under the rule of *Tulk v. Moxhay*,^{Land} a vendor of freehold land may attach to the land sold restrictive covenants as to its future use and enjoyment. Also onerous covenants in a lease which touch and concern the land demised will run upon an assignment of the lease or of the reversion.⁶ The benefit of such covenants may also be assigned, and so third parties may acquire rights under a contract to which they were not privy.⁷ The topic of assignment will, however, be dealt with more fully in a later chapter.

A more controversial exception is provided by section 56 (1) of the Law of Property Act, 1925,⁸ which states:

Law of
Property
Act, s. 56

¹ Viz. *infra*, p. 388.

² Although it is now well recognized: *Sinason-Teicher Inter American Grain Corporation v. Oilcakes and Oilseeds Trading Co., Ltd.*, [1954] 1 W.L.R. 935, at p. 941; *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.*, [1954] 2 Q.B. 402.

³ In *Urquhart, Lindsay & Co., Ltd. v. Eastern Bank*, [1922] 1 K.B. 318, Rowlatt J. thought that a consideration might be found where the seller had acted upon the buyer's undertaking to his detriment, e.g. by manufacturing the goods. Cf. *Dexters, Ltd. v. Schenker & Co.* (1923), 14 Ll. L. Rep. 586, at p. 588.

⁴ In the Sixth Interim Report of the Law Revision Committee, 1937 (Cmd. 5449), § 45, it was pointed out that the liquidator of a bank might be compelled to rely on this technical defence. But cf. *British Imex Industries, Ltd. v. Midland Bank, Ltd.*, [1958] 1 Q.B. 542.

⁵ *Infra*, p. 380.

⁶ *Spencer's Case* (1583), 5 Co. Rep. 16a.

⁷ See ss. 78 (1) and 79 (7) of the Law of Property Act, 1925 (15 & 16 Geo. V. c. 20), and also *Smith and Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500.

⁸ 15 & 16 Geo. V. c. 20.

A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

In its terms this section is wide enough to comprehend any person who might conceive it profitable to himself to intervene in a conveyance made by others, but such could scarcely have been the intention of the legislature. Accordingly the Courts have held that it can only be invoked by one who might have been a party to the conveyance, and who is within the scope and benefit of the covenants contained in it.¹ In *White v. Bijou Mansions, Ltd.*, Simonds J. explained:²

... only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, or with which some agreement or covenant is purported to be made.

He need not be expressly named as a covenantee³ provided that he can show that it was made directly for his benefit.⁴

Does it
extend to
other pro-
perty?

It has, however, been contended by Denning L.J. (as he then was) that the section is not confined to contracts concerning land, but extends to all cases where property of any description is concerned.⁵ He points out that the section substantially replaces section 5 of the Real Property Act, 1845, but with the addition of the words 'or other property' and 'or agreement'. So, he contends, the section is to be construed as an abrogation of the doctrine of privity where property is concerned, the Courts being consequently free to hold that a third party can sue on a contract made expressly for his benefit. But such a bold disregard of the traditional canons of statutory interpretation runs counter to the earlier authorities.⁶

¹ *Re Ecclesiastical Commissioners for England's Conveyance*, [1936] Ch. 430; *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610; *Smith and Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; *Stromdale and Ball, Ltd. v. Burden*, [1952] Ch. 223; *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1954] 1 Q.B. 250; Elliott (1956), 20 Conv. (N.S.) 43, 114.

² [1937] Ch. 610, at p. 625.

³ Cf. *Re Forster* (1938), 159 L.T. 279; *Re Miller's Agreement*, [1947] 1 Ch. 615.

⁴ *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1954] 1 Q.B. 250; Wade, [1954] Camb. L.J. 66.

⁵ *Smith and Snipes Hall Farm, Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500, at p. 514.

⁶ *Re Forster* (1938), 159 L.T. 279, at p. 282; *Re Sinclair's Life Policy*, [1938] Ch. 799, at p. 805.

These have held that the section is to be read in its context, and that it cannot give to a third party a beneficial interest in the performance of a contract if, apart from the section, he had no such interest. In *Re Miller's Agreement*:¹

Prior to the dissolution of a partnership, the continuing partners covenanted with the retiring partner that, as from his death, they would pay to his widow and daughters certain annuities. The annuities were paid, but the Inland Revenue claimed that the annuitants were liable to pay death duties under the Finance Act, 1894, as they had received a beneficial interest on his death.

It was argued on behalf of the Inland Revenue that, although the annuitants were not parties to the contract, they acquired such an interest by virtue of section 56 (1) of the Law of Property Act, 1925. This argument was rejected by Wynn-Parry J. who held that the section had no such effect. It did not create any fresh rights to sue under a contract, but only protected rights already shown to exist.

It can therefore safely be said that the traditional doctrine of privity, and the traditional exceptions concerning land, have been very little affected by the operation of this section. The legislature could not have intended to overthrow the doctrine by a side-wind, and any observations to the contrary effect must be disregarded.

Other Exceptions

In certain circumstances a third party may be able to enforce a warranty arising out of a contract to which he is not a party. In *Shanklin Pier, Ltd. v. Detel Products, Ltd.*:²

The plaintiffs were the owners of a pier at Shanklin, in the Isle of Wight. They wished to paint the pier and consulted the defendants, a firm of paint manufacturers. The defendants told them that their paint was suitable for the purpose, and, acting on the faith of this statement, the plaintiffs caused to be inserted in their agreement with the contractors who were to paint the pier a term requiring the use of the defendants' paint. The paint proved unsuitable and the plaintiffs sued the defendants for breach of warranty.

It was clear that the plaintiffs were strangers to the contract for the purchase of paint made between the contractors and the

¹ [1947] 1 Ch. 615.

² [1951] 2 K.B. 854; *Brown v. Richmond Car Sales, Ltd.*, [1950] 1 All E.R. 1102. Cf. *Drury v. Victor Buckland, Ltd.*, [1941] 1 All E.R. 269.

defendants. Nevertheless they were able to sue on the warranty given. In his judgment McNair J. said:¹

I see no reason why there may not be an enforceable warranty between *A* and *B* supported by the consideration that *B* should cause *C* to enter into a contract with *A* or that *B* should do some other act for the benefit of *A*.

This principle is particularly applicable to cases of hire-purchase where the seller first sells the article to a hire-purchase company who then hire it to the buyer. If the seller gives a warranty, this warranty is enforceable against him by the buyer, even though there is no direct contractual relationship between them.²

and other exceptions Other exceptions, or quasi-exceptions, to the doctrine may be seen in assignment,³ agency (including the doctrine of the undisclosed principal),⁴ trusts, transfer on death,⁵ and bankruptcy.⁶ But these will be dealt with later, and in greater detail.

Comment

Criticism of doctrine The doctrine of privity of contract, together with the rule that consideration must move from the promisee, has been the subject of considerable criticism both in the Courts and among the writers of textbooks on the law of contract. It is said that it serves only to defeat the legitimate expectations of the third party, that it undermines the social interest of the community in the security of bargains, and that it is commercially inconvenient. It is also pointed out that it is absent from the law of Scotland, and generally from the legal systems of the United States. In their Sixth Interim Report,⁷ the Law Revision Committee recommended the abolition of the doctrine. The actual terms of their recommendation read:

Proposals

Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.

¹ At p. 856.

³ *Infra*, p. 363.

⁶ *Infra*, p. 390.

² *Andrews v. Hopkinson*, [1957] 1 Q.B. 229.

⁴ *Infra*, p. 518.

⁵ *Infra*, p. 389.

⁷ 1937 (Cmd. 5449), § 48.

In framing this proposal, it is clear that the Committee was conscious of certain difficulties which might arise in connexion and difficulties with the proposed reform.

In the first place, the terms of the recommendation eliminate (i) the a problem which has arisen in certain states of the United States, namely, that of the 'incidental beneficiary', the third party who benefits *incidentally* by the performance of a contract by others.¹ If *A* contracts with *B* to erect an expensive building on *B*'s land, and *C*'s adjoining land would be enhanced in value by the performance of this contract, *C* is merely an incidental beneficiary of the contract made between *A* and *B*. There was no intention directly to benefit him, and he has no right of action. By its requirement that the contract must *by its express terms* purport to confer a benefit directly on the third party, the Committee avoids this difficulty. It would not be possible to infer an intention to benefit the third party from the circumstances surrounding the contract, and so there would be no problem in distinguishing persons whom the contracting parties impliedly intended to benefit from those who did so only incidentally. It may be, however, that this would confine third party rights within too narrow limits, since, as we have seen in connexion with section 56 (1) of the Law of Property Act, 1925, it is often the implied beneficiary who is most in need of the assistance of the statute.

Secondly, the third party would not acquire an absolute (ii) subject right to have the contract performed.² Any defences available to the promisor against the other party to the contract would also be available against the third party. He would therefore be in the same position as an assignee of a contractual right.³

Thirdly, it is essential to determine at what point in time the (iii) immutability contractual stipulation made for the benefit of the third party becomes incapable of variation or cancellation by the contracting parties without his consent. Is this to come about when the contract is made?⁴ when it is brought to his notice? when he has materially altered his position in reliance on the promise?⁵ or not at all? The solution proposed by the Committee is that the contracting parties should be free to cancel the contract at

¹ *Restatement*, §§ 133 (1) and 147.

² American law does not generally give such an absolute right: *Restatement*, § 140.

³ *Viz. infra*, p. 376.

⁴ As in Scotland: *Stair, Institutions*, I. x. 5; but the terms of the contract must be capable of such interpretation: *Carmichael v. Carmichael's Executrix*, [1920] S.C. 195.

⁵ As in United States: *Restatement*, § 141.

any time before the third party has adopted the contract either expressly or by conduct.¹

Doctrines not so harmful as represented If the doctrine is to be abolished, the recommendation of the Committee would seem to be a sensible basis for a new rule as to third party rights. It is doubtful, however, whether the rule is so practically inconvenient as its critics would have us believe. The more obvious difficulties, such as those concerning insurance, have been largely provided for by statute, and commercial practice has, as we have seen, gone a long way to mitigate the rigours of the doctrine in that sphere. It could well be argued that the price to be paid for its abolition, that is the immutability, in part, of an otherwise flexible business agreement, is too great when compared with the few cases in which the doctrine works any substantial injustice to a third party. The fact that no steps have been taken to implement the Committee's proposals would, perhaps, indicate that this was so, and that the existing exceptions were sufficient to provide for all but the most exceptional cases.

¹ Certain states in the United States have this rule: see Williston, *Contracts*, § 365.

CHAPTER XI

ASSIGNMENT AND NEGOTIABILITY

THE parties to a contract may, under certain circumstances, drop out and others take their places. In this chapter we shall consider the subject of assignment, that is to say, the transfer of contractual rights and liabilities to a third party with or without the concurrence of the other party to the contract, and also the nature of negotiable instruments. Assign-
ment of
contract

I. ASSIGNMENT BY ACT OF THE PARTIES OF CONTRACTUAL LIABILITIES

A promisor cannot assign his liabilities under a contract; or, conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept any but the promisor as the person liable to him on the promise. Liabilities
cannot be
assigned

The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract. It is illustrated by the case of *Robson and Sharpe v. Drummond*:¹

Sharpe hired a carriage to Drummond at a yearly rent for five years, undertaking to paint it every year and to keep it in repair. Robson was the partner of Sharpe, but the contract was made with Sharpe alone. After three years Sharpe retired from business, and Drummond was informed that Robson was thenceforth answerable for the painting and repair of the carriage, and would receive the payments. He refused to deal with Robson, and returned the carriage.

It was held that he was entitled to do so. The reason for the decision was given by Lord Tenterden:²

Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person.

Parke J. also considered that Drummond might refuse to allow Robson to take over the contract, because 'he had a right to have the judgment and taste of Sharpe to the end'.³

¹ (1831), 2 B. & Ad. 303.

² At p. 307.

³ At p. 308.

Apparent
exceptions

(i) Vicari-
ous per-
formance

There are certain limitations to this rule. In the first place, there may be circumstances which make it permissible for a contracting party to perform his side of the contract vicariously, by getting someone else to do in a satisfactory fashion the work for which the contract provides. If *A* undertakes to do work for *X* which needs no special skill, and it does not appear that *A* has been selected with reference to any personal qualification, *X* cannot complain if *A* gets the work done by an equally competent person. Such cases are sometimes loosely referred to as assignments of a contractual liability, but they are really instances of the *vicarious performance* of a contract. The original contracting party remains liable on the contract and only he as a rule is entitled to sue for payment. This is clearly stated by Lord Greene M.R. in *Davies v. Collins*:¹

In many contracts all that is stipulated for is that the work shall be done and the actual hand to do it need not be that of the contracting party himself; the other party will be bound to accept performance carried out by somebody else. The contracting party, of course, is the only party who remains liable. He cannot assign his liability to a sub-contractor, but his liability in those cases is to see that the work is done, and if it is not properly done he is liable. It is quite a mistake to regard that as an assignment of the contract; it is not.

A contract may be vicariously performed where, from the terms of the contract, its subject-matter, and surrounding circumstances, it may properly be inferred that it is a matter of indifference whether the performance is that of the contracting party or his nominee. The Court was prepared to make this inference in the case of *British Waggon Company v. Lea & Co.*:²

The Parkgate Waggon Company (who were co-plaintiffs in the action) had agreed to let a number of railway waggons to the defendants and to keep them in repair. The Parkgate Company went into liquidation and assigned both the benefit of, and the liabilities under, the agreement to the British Waggon Company. The defendants claimed to treat the contract as at an end and refused to accept the services of the British Company.

It was held that the contract could be vicariously performed by the British Company. The Court distinguished *Robson and Sharpe v. Drummond* on the ground that here the defendants could not have attached any special importance to the repairs being done by the Parkgate Company; it was 'a rough descrip-

¹ [1945] 1 All E.R. 247, at p. 249. See also *Stewart v. Reavell's Garage*, [1952] 2 Q.B. 545.

² (1880), 5 Q.B.D. 149.

tion of work which ordinary workmen conversant with the business would be perfectly able to execute',¹ and quite unlike the painting and repair of a gentleman's carriage.

If, however, the person employed has been selected with reference to his individual skill, competency, or other personal qualification, it is not sufficient for him to secure the performance of the contract by another. Thus it has been held that personal care and skill is an ingredient in a contract by a warehouseman for the storage of furniture,² and also in the contract by a publishing firm for the publication of a book.³ Such contracts cannot be vicariously performed without the consent of the promisee. Contracts of service are normally personal to the contracting parties.⁴

Another way by which the burden of a contract may be 'assigned' at common law is with the consent and co-operation of the party entitled to performance; but this is in effect the rescission of one contract and the substitution of a new one in which the same acts are to be performed by different parties.⁵ This is called 'novation' and it can only take place by agreement between the parties; novation cannot be forced on the person charged. It is therefore not properly to be regarded as an assignment. (ii) Novation

Where an interest in land is transferred, liabilities attaching to the enjoyment of the interest may pass with it. But this arises from the peculiar nature of obligations attached to land, and need not be discussed here. (iii) Interests in land

II. ASSIGNMENT BY ACT OF THE PARTIES OF CONTRACTUAL RIGHTS⁶

No Assignment at Common Law

At common law, apart from negotiable instruments in the law merchant, the benefit of a contract could not be assigned so as to enable the assignee to bring an action upon it in his own name. This rule is sometimes expressed by the phrase 'a chose in action is not assignable'. No assignment of benefit at common law

"Chose in action" is a known legal expression used to

¹ *Ibid.*, per Cockburn C.J. at p. 153.

² *Edwards v. Newland & Co.*, [1950] 2 K.B. 534.

³ *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21.

⁴ *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014 (rights).

⁵ *Viz. infra*, p. 366.

⁶ For a more detailed study, see Marshall's *Assignment of Choses in Action* (1950).

describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.'¹ The contrasted term is 'choses in possession'. The definition of a chose in action thus includes not only contractual rights but many rights which are not contractual, e.g. patent rights, copyright, rights of action in tort. We are concerned here, however, only with the assignment of contractual rights.

Exception

The only exception allowed by the common law was in the case of assignments by or to the Crown; other than this, no assignment of a chose in action was recognized. The reason for this rule seems to have been that the common law judges feared that to permit assignments would both undermine the doctrine of privity of contract² and encourage unnecessary and vexatious litigation.³ It was, however, possible to transfer rights under a contract indirectly by other means:

and some
transfer
possible

In the first place, the 'assignor' could give to the third party a power of attorney and thus enable him to sue the debtor as his representative.⁴

Secondly, he could allow the third party to sue the debtor in his (the assignor's) name, taking from him an indemnity against costs; but he could not be compelled to do this.

Thirdly, with the consent and co-operation of the debtor, he could effect a transfer by means of a substituted agreement, or 'novation', as follows:

If *A* owes *M* £100, and *M* owes *X* £100, it may be agreed between all three that *A* shall pay *X* instead of *M*, who thus terminates his legal relationship with either party. In such a case the consideration for *A*'s promise to pay *X* is the discharge by *X* of *M*'s debt; for *M*'s discharge of *A*, the promise of *A* to pay *X*; for *X*'s discharge of *M*, the discharge by *M* of *A*'s debt to him.

But a mere written authority from the creditor to the debtor (i.e. from *M* to *A*) to pay the amount of the debt over to a third party, even though the debtor acknowledged in writing the authority given, did not entitle the third party to sue for the amount unless he had furnished consideration by an express promise to release the creditor from his debt.⁵

¹ *Torkington v. Magee*, [1902] 2 K.B. 427, per Channell J. at p. 430

² *Fitzroy v. Cave*, [1905] 2 K.B. 364, per Cozens-Hardy L.J. at p. 372.

³ *Lampet's Case* (1612), 10 Co. Rep. 46b, at 48a.

⁴ *Master v. Miller* (1791), 4 Term R. 320, at p. 340.

⁵ *Liversidge v. Broadbent* (1859), 4 H. & N. 603. But cf. *Walker v. Rostron* (1842), 9 M. & W. 411 and *Shamie v. Foory*, [1958] 1 Q.B. 448; *infra*, p. 565.

But these methods were cumbrous and unsatisfactory, and from a fairly early period equity was prepared to recognize an assignment of a chose in action and to allow an assignee to invoke its aid.¹ Thus it is that equitable assignment forms the basis of our law, and in this subject we move in the Court of Chancery among equitable principles and remedies.

Assignment in Equity

Equity would permit the assignment of a chose in action, including debts and other contractual rights, whether such chose was legal or equitable. Assign-ability of benefit in equity

An *equitable* chose is one which, before 1875, could only be enforced in the Court of Chancery, such as a share in a trust fund, a legacy, or a reversionary interest under a will. Where there was an assignment in equity of an equitable chose in action, the assignee was allowed to bring his action in his own name and the assignor did not have to be made a party to it. The reason for this was that since there was no claim that might be asserted by an action at law, the Court of Chancery had exclusive jurisdiction over the whole transaction; there was therefore no risk that the trustees of the fund (i.e. the debtors) would be exposed to a second action at law by the assignor. But even in the case of an equitable chose the assignor might be entitled to be represented in the action if he still had some interest in the suit. of equitable choses

A *legal* chose in action is one which, before 1875, could be enforced by an action at law, for example, a right under a contract, a debt, or a claim under a policy of insurance. Equity would recognize the assignment of a legal chose in action, but had here to proceed more carefully. If equity itself enforced the claim of the assignee, that would not prevent the assignor from bringing his action at law; and the debtor would have been put to the inconvenience of resorting to equity to restrain the assignor from enforcing the judgment on the ground that the assignee had already recovered in equity. Consequently the Court of Chancery did not in the ordinary case enforce the assignee's claim. What it did was to infer from the assignment a duty on the assignor, on receiving a proper indemnity against costs, to lend his name to the assignee so that the latter might bring an action at law. If necessary, it would enforce this duty.² and of legal choses

¹ For a history of assignment, see Bailey (1931), 47 L.Q.R. 516, (1932), 48 L.Q.R. 248, 547.

² *Hammond v. Messenger* (1838), 9 Sim. 327.

So whenever a legal chose in action was assigned in equity—and it could not be assigned otherwise—the action in a Court of Law was brought in the assignor's name.¹ This was primarily in the interests of the party liable, so that one action should bind both assignor and assignee; and partly in the interests of the assignor, so that he might dispute the assignment if he thought fit.

Since the Judicature Act, 1873,² an assignment in equity will be recognized by all divisions of the High Court of Justice, whether it be of a legal or equitable chose in action. But the rules relating to such assignments (including the use of the assignor's name) are the same as those in operation before the passing of the Act. We shall examine these rules in detail later, but it is first necessary to note that section 25 (6) of the Judicature Act (now replaced by section 136 of the Law of Property Act, 1925³) introduced a new statutory assignment which takes effect *at law*.

Statutory Assignments

Law of Property Act, 1925, s. 136 Section 136 of the Law of Property Act, 1925, reads as follows:

Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice has been given to the debtor, trustee or other person from whom the assignor would have been able to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor:

The effect of this section, provided the conditions laid down in it are fulfilled, is to give to the assignee a right at law and thus enables him to sue in his own name.⁴ It is necessary to examine the words of the section in some detail:

¹ See, however, the statement of practice by Buller J. in *Master v. Miller* (1791), 4 Term Rep. 320, at p. 341, which shows that a Court of Law did not always insist on the rule, but would allow the assignee to sue in his own name where the justice of the case seemed to demand it. Also see Marshall's *Assignment of Choses in Action*, p. 74, for other cases of this 'equitable jurisdiction' of the common law. ² 36 & 37 Vict., c. 66. ³ 15 & 16 Geo. V, c. 20.

⁴ Subject to the right of a debtor who receives notice of a disputed assignment to call upon the persons giving notice to interplead.

(a) 'Assignment'

The section does not touch the rules of assignment in equity so that equitable assignments remain unimpaired;¹ nor does it make assignable contracts which were not assignable in equity before: Equitable assignments unimpaired

This sub-section is merely machinery; it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the assignor's own name, but only where he could so sue.²

(b) 'Absolute'

The Act requires the assignment to be 'absolute' and not 'by way of charge'. This means that it must not be subject to any condition, and that it must be an assignment of a sum due or about to become due, not of an amount which is dependent on any question as to the state of accounts between assignor and assignee. Statutory assignments absolute

If the assignment is to take effect or to cease upon the happening of a future uncertain event, so that the original debtor is uncertain as to the person in whom the right to receive the money is vested, the assignment is conditional and not absolute. Thus in *Durham Brothers v. Robertson*:³ and not conditional

A firm of building contractors wrote to the plaintiffs in the following terms: 'Re Building Contract, South Lambeth Road. In consideration of money advanced from time to time we hereby charge the sum of £1,080, being the price . . . due to us from John Robertson (the defendant) on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you'.

It was held that the assignment was not within the section. It did not transfer the whole debt to the plaintiffs unconditionally, but only until the advances were repaid. The defendant could not be sure that he was paying his debt to the right person without knowing the state of accounts between the assignor and assignee. But an assignment which passes the entire interest of the assignor in the debt may still be absolute despite the fact that it contains a proviso for redemption and reassignment on repayment.⁴ The assignment is subject to a condition,

¹ *Brandt's Sons & Co. v. Dunlop Rubber Co., Ltd.*, [1905] A.C. 454, at p. 461.

² *Torkington v. Magee*, [1902] 2 K.B. 427, per Channell J. at p. 435; *Marchant v. Morton, Down & Co.*, [1901] 2 K.B. 829, at p. 832.

³ [1898] 1 Q.B. 765.

⁴ *Tancred v. Delagoa Bay and East Africa Rail Co.* (1889), 23 Q.B.D. 239.

but it cannot prejudice the debtor. He will receive notice first of the assignment, and then of the reassignment, if one is made, so that he will always know to whom he owes the debt. There may, too, be an absolute assignment of a debt arising out of an existing contract, even though it does not become payable until a date later than the assignment.¹

or by way
of charge

The assignment must also not purport to be by way of charge. An assignment by way of charge is one which merely gives a right to payment out of a particular fund, and does not transfer the fund to the assignee. A good illustration is furnished by *Jones v. Humphreys*:²

K., a schoolmaster, in consideration of a loan to him of £15, assigned to the plaintiff so much and such part of his income, salary and other emoluments from his employers as should be necessary and requisite for repayment of the sum borrowed (with interest) or of any further or other sums in which he might thereafter become indebted to the plaintiff.

It was held that this was not an absolute assignment, but was a mere security purporting to be by way of a charge. Even the assignment of a definite part of an existing debt is not absolute, but merely a charge upon the whole debt;³ for otherwise it would be in the power of the original creditor 'to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit',⁴ thus obviously prejudicing the position of the debtor. But any of these assignments, though not absolute, and therefore outside the section, may still be perfectly good as equitable assignments.

(c) 'Writing'

Assign-
ment must
be in writ-
ing

The assignment must be in writing and signed by the assignor; signature by an agent is probably insufficient.

(d) 'Notice'

Need for
express
notice

The Act requires that express (i.e. written) notice should be given to the debtor or trustee. This requirement is peremptory, so that in a case where the debtor was unable to read and it was therefore thought useless to give him written notice, though the assignment was read over to him and understood by him, there was held to be no legal assignment.⁵ The written

¹ *G. & T. Earle, Ltd. v. Hemsworth R.D.C.* (1928), 44 T.L.R. 758.

² [1902] 1 K.B. 10.

³ *Williams v. Atlantic Assurance Co.*, [1933] 1 K.B. 81.

⁴ *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765, per Chitty L.J. at p. 774.

⁵ *Hockley v. Goldstein* (1922), 90 L.J.K.B. 111.

notice, however, need not be in any particular form, provided that it sufficiently indicates the fact of the assignment.¹ The assignment takes effect from the date of the notice.

(e) *Consideration*

An assignment under the Act does not require the assignee to have furnished consideration in order to make it valid as between assignor and assignee or to enable the assignee to sue in his own name.²

Consideration not required

(f) *Rights assignable*

The Act refers to 'any debt or other legal thing in action'. The meaning of this expression has been considered in several cases.³ It is not, as might appear at first sight, confined to legal choses in action, which were enforceable only in a Court of Common Law, but extends to choses in equity as well.⁴ In *Torkington v. Magee*,⁵ Channell J. said:

Extent of statute

I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable'.

A 'legal thing in action' may therefore be defined as any right the assignment of which a Court of Law or Equity would, before the Judicature Act, have recognized or enforced.

Statute has also created further exceptions to the rule that there can be no assignment at law. For example, by the Policies of Assurance Act, 1867,⁶ and by the Marine Insurance Act, 1906,⁷ policies of life and marine insurance can be assigned, but the former Act requires notice to be given by the assignee to the insurance company. Shares in a company are assignable under the provisions of the Companies Act, 1948,⁸ and shares and interests in Government Stock by the Finance Act, 1942.⁹

Further statutory exceptions

¹ *Denney v. Conklin*, [1913] 3 K.B. 177.

² *In re Westerton*, [1919] 2 Ch. 104.

³ *Torkington v. Magee*, [1902] 2 K.B. 427; *Victoria Insurance Co. v. King* (1895), 6 Q.L.J. 203; *In re Pain*, [1919] 1 Ch. 38.

⁴ *In re Pain*, [1919] 1 Ch. 38.

⁵ [1902] 2 K.B. 427, at p. 430; reversed on other grounds [1903] 1 K.B. 644.

⁶ 30 & 31 Vict., c. 144.

⁷ 6 Edw. VII, c. 41.

⁸ 11 & 12 Geo. VI, c. 38.

⁹ 5 & 6 Geo. VI, c. 21.

Equitable Assignments

**Assign-
ment in
Equity** An assignment which does not comply with one or more of the requirements of section 136 of the Law of Property Act, 1925, may still be a perfectly good and valid equitable assignment. 'The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree.'¹ But whereas a statutory assignee is entitled to bring an action in his own name, without the necessity of joining his assignor as a party to the action, an assignee in equity will not always enjoy this right.

(a) Joinder of the assignor

**Can
assignee
sue in his
own name?** If the chose in action assigned is *equitable*, the assignee is normally entitled to sue in his own name. The exception is where the assignor still considers that he has some interest in the suit. This may arise where there is still some question of accounts outstanding between the assignor and the assignee, or where the assignment consists of a charge upon a trust fund. In such a case the parties interested are entitled to be represented in the action.

If the chose in action is *legal*, the assignee cannot sue in his own name. He must joint the assignor as a party to the action, either as co-plaintiff if he is willing, or as co-defendant if he is not.² Moreover the *assignor* of part of a debt cannot recover the balance in excess of the sum assigned without joining the assignee.³ It might be thought that these requirements were merely procedural vestiges of a situation which prevailed before the fusion of the Courts of common law and equity, but in many cases they will still serve to protect the debtor against the possibility that he will pay his debt to the wrong person.⁴

(b) Form

**Informal
nature of
equitable
assign-
ments** No particular form is necessary for an equitable assignment, and, except where the interest assigned is an equitable interest or trust within section 53 of the Law of Property Act, 1925,⁵ it need not even be in writing. It may be addressed to the debtor or to the assignee. If it is addressed to the debtor:

¹ *Brandt's Sons & Co. v. Dunlop Rubber Co., Ltd.*, [1905] A.C. 454, *per* Lord Macnaghten at p. 462.

² *Performing Rights Society v. London Theatre of Varieties, Ltd.*, [1924] A.C. 1.

³ *Walter & Sullivan, Ltd. v. J. Murphy & Sons, Ltd.*, [1955] 2 Q.B. 584.

⁴ *Ibid.*, *per* Parker L.J. at p. 588.

⁵ 15 & 16 Geo. V, c. 20.

It may be couched in the language of a command. It may be a courteous request. It may assume the form of a mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person.¹

In *Thomas v. Harris*,² it was addressed to the assignee:

A father handed to his son certain insurance policies on his life with the request that the son should erect a tombstone in his memory, using the policy monies for this purpose. No notice was given to the insurance company.

It was held that, by this informal act, the father had assigned the policies to his son by way of charge for the cost of the tombstone. There was a valid equitable assignment.

(c) Notice

No notice to the debtor is necessary; the assignment is effective as between assignor and assignee from the moment it is made.³ Notice is nevertheless *advisable* for several reasons. In the first place, the assignment will not bind the debtor until he has received notice, not necessarily in writing, of the assignment. So, if, before notice, the debtor pays the assignor, that is a good discharge of his debt.⁴ Secondly, notice to the debtor or trustee is necessary to establish priority under the rule in *Dearle v. Hall*, which we shall deal with later.⁵ Thirdly, notice to the debtor will prevent him from setting up new equities which may mature between himself and the assignor after he receives the notice. Finally, if the assignment is in writing, and is absolute, written notice may entitle the assignee to sue the debtor in his own name under the provisions of the Law of Property Act, 1925.

Advisability of notice

(d) Consideration

The question whether, as between assignor and assignee, consideration is necessary in an equitable assignment is a difficult one.⁶ Equity will not assist a volunteer, and it has been said that 'for every equitable assignment . . . there must be consideration. If there be no consideration, there can be no

Is consideration necessary?

¹ *Brandt's Sons & Co. v. Dunlop Rubber Co., Ltd.*, [1905] A.C. 454, per Lord Macnaghten at p. 462.

² [1947] 1 All E.R. 444.

³ *Brandt's Sons & Co. v. Dunlop Rubber Co., Ltd.*, [1905] A.C. 454, at p. 462.

⁴ *Stocks v. Dobson* (1853), 4 De G. M. & G. 15.

⁵ *Infra*, p. 377.

⁶ For a discussion of this subject see Megarry (1943), 59 L.Q.R. 58; Holland (1943), 59 L.Q.R. 129; Marshall, *The Assignment of Choses in Action*, p. 109.

equitable assignment'.¹ This statement is, however, much too wide, and it is by no means true to say that value is required in every case.

Valuable consideration for this purpose may consist in any consideration sufficient to support a simple contract, or an antecedent debt or liability.² Thus if *A* assigns to *B* the benefit of a contract in satisfaction of a debt owed by *B* to *A*, this is good consideration for the assignment. Similarly if the assignment is by way of security for an existing debt in such circumstances that a forbearance to sue will be implied on the part of the assignee, this is sufficient to give the assignee a right to sue the debtor.³ If consideration has been furnished by the assignee, no problem will arise; it is where the assignment is voluntary that some doubt exists.

Agreements to assign
On the other hand, a mere *agreement* to assign a chose in action must, like other contracts, have consideration to support it; if it is voluntary, it is unenforceable. An assignment of a future chose in action also requires consideration.⁴ A future chose in action is a right of property not yet in existence, such as freight not yet earned,⁵ or damages in an action which is still pending.⁶ Such an assignment can only operate as a contract to assign when the subject-matter comes into existence; it is therefore unenforceable unless value has been given.

Gratuitous assignments
But just as it is possible to make a gift of a chattel, so also it is possible to make a gift of (i.e. to transfer without consideration) a chose in action, provided that the transfer is effected in whatever manner is necessary for a transfer of that particular chose. Such a transfer, however, must, as it is said, be 'complete and perfect', for if anything remains to be done in order to give effect to the donor's intention, the gift will fail. Equity will not intervene to perfect an imperfect gift. This principle is similar to that enunciated by Turner L.J. in *Milroy v. Lord*⁷ in relation to voluntary settlements:

In order to render a voluntary settlement valid and effectual, the settlor must have done everything, which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.

¹ *Glegg v. Bromley*, [1912] 3 K.B. 474, per Parker J. at p. 490.

² *Currie v. Misa* (1875), L.R. 10 Ex. 153; *Leask v. Scott* (1877), 2 Q.B.D. 376; (1943), 59 L.Q.R. 208. ³ *Glegg v. Bromley*, [1912] 3 K.B. 474.

⁴ *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

⁵ *Brown v. Tanner* (1868), L.R. 3 Ch. App. 597.

⁶ *Glegg v. Bromley*, [1912] 3 K.B. 474.

⁷ (1862), 4 De G.F. & J. 264, at p. 274.

The question of consideration in equitable assignments turns, therefore, on whether any act remains to be done by the assignor in order to perfect the assignment; every effort must have been made by him to complete his intention.¹

If the subject assigned is an equitable chose in action, the assignment is complete when the assignor has unequivocally, even though informally, expressed his intention that the chose should henceforth belong to the assignee.² The assignee is then, as we have seen, in a position to enforce his right to the chose without more ado; he does not have to seek the aid of the assignor in order to bring an action. But if the subject of the assignment is a legal chose in action, can a merely equitable assignment of it be said to be complete and perfect? That is the question on which the law is still not altogether clear.

The difficulty of so regarding the transaction is that it leaves the legal title to the chose transferred still outstanding in the assignor, and we have seen that under the old practice in such a case an action against the debtor had to be brought in the name of the assignor. But an assignee who had given no consideration for the assignment could not appeal to equity to compel his assignor to join in an action, and the assignment therefore, it might be argued, was not complete and perfect. Under the modern practice, however, this argument has lost its force; as we have seen,³ it is not now necessary for the assignee to ask the Court to compel the assignor to join with him as co-plaintiff, for if he is unwilling to do so he can be made a defendant. In other words, an equitable assignee of a legal chose in action is now able to enforce his rights against the debtor without seeking the aid either of his assignor or of the Court, and there seems no reason why the assignment should not be regarded as complete and perfect and consequently effective without consideration.⁴ It seems therefore today the better view is that, as between assignor and assignee, consideration is not necessary to make effective an equitable assignment of a chose in action whether the chose assigned be legal or equit-

¹ *Fortescue v. Barnett* (1834), 3 My. & K. 36; (1943), 59 L.Q.R. 61, 129.

² But if the assignment is merely by way of charge and does not transfer the equitable interest itself to the donee, it is unenforceable: *Re Lucan (Earl of)*. *Hardinge v. Cobden* (1890), 45 Ch. D. 470.

³ *Supra*, p. 372.

⁴ *Holt v. Heatherfield Trust*, [1942] 2 K.B. 1; *Re Patrick*, [1891] 1 Ch. 82, *Re Griffin*, [1899] 1 Ch. 408; *German v. Yates* (1915), 32 T.L.R. 52. See (1943), 59 L.Q.R. 61, 129.

able.¹ It certainly seems desirable that this view should prevail, for a different rule as to consideration according as to whether the chose is legal or equitable would be an anomaly difficult to defend.

Title

Assignee
takes
subject to
equities

Whether the assignment of a chose in action is legal or equitable, the assignee takes 'subject to equities', that is, subject to all such defences as might have prevailed against the assignor *before notice was given to the debtor*. 'The general rule, both at Law and in Equity, is that no person can acquire title to a chose in action . . . from one who has himself no title to it.'² An assignee of contractual rights must therefore take care to ascertain the exact nature and extent of those rights; for he cannot take more than the assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned.

For instance, if one of two parties is induced to enter into a contract by fraud, and the fraudulent party assigns his interest in the contract for value to a third person who is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of its assignment to an innocent party.³ By the same token, a debtor has the same right of set-off against the assignee as he had against the assignor, provided that the right has accrued before he receives notice of the assignment.⁴

but not to
personal
claims
against
assignor

But the debtor cannot set up against an innocent assignee a claim of a strictly personal nature which he may have against the assignor—for example, a claim for damages for fraud for having been induced to enter into the contract. He is restricted to claims which arise out of the contract itself and do not exist independently of it. Thus in *Stoddart v. Union Trust*:⁵

The Union Trust were fraudulently induced by one Price to buy a newspaper called 'Football Chat' for the sum of £1,000, of which £200 was to be paid immediately, and the balance of £800 by instalments. Price assigned this £800 to the plaintiff, Stoddart, who took in good faith without knowledge of the fraud. When sued by Stoddart, the Union Trust pleaded that they had sustained damage exceeding £800 and that therefore no money was owed by them.

¹ Marshall, *Assignment of Choses in Action*, p. 109.

² *Crouch v. Crédit Foncier of England* (1873) L.R. 8 Q.B. 374, at p. 380.

³ *Graham v. Johnson* (1869), L.R. 8 Eq. 36.

⁴ *Roxburghe v. Cox* (1881), 17 Ch. D. 520.

⁵ [1912] 1 K.B. 181.

The Court of Appeal rejected this contention and held that the Union Trust could not set off their claim for damages against the assignee. Kennedy L.J. said:¹

It is strictly a personal claim against the man Price, who committed an actionable wrong in so inducing the Union Trust to enter into the contract. I do not think that this claim comes within the category of claims arising out of the contract sued upon which the person sued by the assignee of a chose in action may set up for his protection, either complete or partial, against the assignee's claim.

The effect of notice is to prevent the debtor from setting up against the assignee any fresh equities which may mature between him and the assignor. 'After notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice.'²

Priorities

It may happen that an assignor makes two or more assignments of the same chose in action to different assignees. If the fund is insufficient to meet all the claims, a problem of their respective priorities will arise. The rule is that *equitable titles have priority according to the priority of notice*.³ The successive assignees of an obligation rank as to their title, not according to the dates at which the creditor assigned his rights to them respectively, but according to the dates at which notice was given to the party to be charged. This rule is generally known as the rule in *Dearle v. Hall*.⁴ The reason lying behind it seems to be that, by failing to give notice to the debtor, the first assignee has enabled the assignor to make a second, and possibly fraudulent, assignment to the subsequent assignee; he ought therefore to be postponed to the latter even though his assignment was first in time.

But the first assignee will only be postponed to a subsequent assignment of which prior notice has been given, if, at the time of his assignment, the second assignee had no knowledge of the previous assignment.⁵ If he had such knowledge, he could scarcely claim to have been misled.

Except where the interest assigned is an equitable interest in

¹ At p. 193.

² *Roxburghe v. Cox* (1881), 17 Ch. D. 520, per James L.J. at p. 526.

³ *Marchant v. Morton, Down & Co.*, [1901] 2 K.B. 829.

⁴ (1823) 3 Russ. 1.

⁵ *Re Holmes* (1885), 29 Ch. D. 786.

land or in personalty, when the notice must be in writing,¹ no special form is required for a notice to gain priority. Provided it is clear and unequivocal, and brought home to the party charged, oral notice is sufficient. Even a notice in a newspaper read by the debtor has been held to suffice.² If the interest assigned is an equitable interest in a trust fund, it is advisable to give notice to all the trustees in order to be perfectly safe; otherwise notice given to one trustee alone may determine with his death or resignation.³

Rights Not Assignable

Limits to assign-ability (i) bare right of action Some choses in action are not assignable, and not every right which arises *ex contractu* can be assigned.

In the first place, it is said that by reason of the rules against champerty and maintenance a mere right to sue for damages cannot be assigned.⁴ It appears to be generally accepted that a right of action in tort cannot be assigned;⁵ but a distinction has also been drawn between the assignment of a bare right of action for breach of contract and the assignment of a bare right of action arising out of or incidental to rights of property which are assigned at the same time.⁶ The latter can be assigned, but the former, it is said, cannot. Thus the purchaser of an estate was permitted to sue for arrears of rent due from a tenant at the date of purchase,⁷ and the purchaser of land injuriously affected by a railway to sue in respect of damage already committed;⁸ but the assignment of a bare 'right to litigate' has been held invalid. Yet it has been urged that it would be strange if an admitted debt can be assigned, while a debt which the debtor has repudiated by refusing to pay became unassignable on the ground that it has thereby become a bare right of action; and it was suggested in *County Hotel and Wine Co. v. London and North Western Railway*,⁹ that the rule is

¹ Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), s. 137 (3).

² *Lloyd v. Banks* (1868), L.R. 3 Ch. App. 488.

³ *Re Phillips' Trusts*, [1903] 1 Ch. 183.

⁴ *May v. Lane* (1894), 64 L.J.Q.B. 236. Cf. *Glegg v. Bromley*, [1912] 3 K.B. 474 (fruits of action).

⁵ *Defries v. Milne*, [1913] 1 Ch. 98.

⁶ *Dawson v. Great Northern and City Railway*, [1905] 1 K.B. 260; *Ellis v. Torrington*, [1920] 1 K.B. 399.

⁷ *Williams v. Protheroe* (1829), 5 Bing. 309; *Ellis v. Torrington*, [1920] 1 K.B. 399.

⁸ *Dawson v. Great Northern and City Railway*, [1905] 1 K.B. 260. The test seems to be 'Was the purchaser's real object the acquisition of an interest in property, or merely the right to bring an action at law?'

⁹ [1918] 2 K.B. 251, at p. 258.

connected with the assignability of choses in action at common law, and that the ground for it has really gone with the recognition of assignability, first in equity, and later under the Judicature Act. The true scope of the rule is not perhaps finally settled, but only the House of Lords is in a position to say that it no longer exists.

Secondly, where some relation of personal confidence ^{(ii) personal contracts} between the parties or their personal qualifications are of the essence of a contract, one party cannot assign his right to the performance of the obligations of the other, since to do so would be to increase or alter the burden undertaken by the other without his consent. In *Kemp v. Baerselman*,¹ for example:

B., a provision merchant, contracted to supply K., a cake manufacturer, with 'all the eggs he should require for manufacturing purposes for one year', K. undertaking not to buy eggs elsewhere so long as B. was ready to supply them. K. purported to assign the benefit of this contract to a large bakery company to whom he had sold his business.

It was held that K. could not effect this assignment, for what B. undertook was to supply all the eggs that K., and not all that anyone other than K., should require. In purporting to assign his right under such a contract, K. was really trying to impose on B. an obligation different from that which B. undertook in the contract. For a similar reason a motor insurance policy cannot be assigned to the purchaser if the car is sold, unless the insurance company consents to the assignment, for that would be to 'thrust a new assured upon a company against its will'.²

On the other hand, where it appears from the nature of the contract that no special personal considerations are involved, so that it can make no difference to the party on whom an obligation rests whether he performs it for the original contracting party or another, there the right to the performance of an obligation may be assigned.³

Finally, no assignment may be made of the salary of a public officer paid out of national funds (for example, by a civil servant of his pay),⁴ or of alimony granted to a wife.⁵ Such ^{(iii) salaries of public officers, &c.} assignments would clearly be contrary to public policy.

¹ [1906] 2 K.B. 604.

² *Peters v. General Accident and Life Assurance Corporation, Ltd.*, [1937] 4 All E.R. 628, per Goddard J. at p. 633.

³ *Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd.*, [1903] A.C. 414; *Shayler v. Woolf*, [1946] Ch. 320.

⁴ *Wells v. Foster* (1841), 8 M. & W. 151; *supra*, p. 295; *Liverpool Corporation v. Wright* (1859), John. 359; *Ex parte Huggins* (1882), 21 Ch. D. 85.

⁵ *Re Robinson* (1884), 27 Ch. D. 160.

III. NEGOTIABLE INSTRUMENTS¹

Negotiability So far we have dealt with the assignment of contracts by the rules of common law, equity, and statute, and it appears that under the most favourable circumstances the assignment of a contract binds the party chargeable to the assignee only when notice is given to him, and subject always to the rule that a man cannot give a better title than he himself possesses.

We now come to deal with a class of promises in writing, the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defences which would have been good against the assignor of the promise. In other words, we come to consider that special class of assignable contracts known as 'negotiable instruments'.

Features of negotiability For an instrument to be negotiable these features seem to be essential:

In the first place, the title to it passes by delivery, or, if it is made to order (that is to say, either expressed to be so payable, or expressed to be payable to a particular person) then by the indorsement of the holder completed by delivery.

Secondly, the written promise which it contains gives a right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.

Thirdly, the holder for the time being (if he is a *bona fide* holder for value) is not prejudiced by defects in the title of his assignor; he does not hold 'subject to equities'.

Fourthly, the instrument is of a type recognized by the law as negotiable. The parties cannot confer negotiability upon a contract which is not recognized by the law to possess this quality.

Types of Negotiable Instrument

Examples of negotiable instruments Certain instruments are negotiable by the custom of merchants recognized by the Courts; others are negotiable by Statute. The operation of negotiability can best be illustrated by reference to some of these.

(a) Cheques

Cheques The type of negotiable instrument which will be most familiar to readers of this textbook is a cheque. A cheque is an

¹ See generally Chalmers' *Bills of Exchange* (12th ed.); Byles' *Bills of Exchange* (21st ed.).

order, addressed to a banker, requesting him to pay a certain sum to the person named on the face of the cheque. If the cheque is made payable to '*A or Bearer*', it can be transferred from one holder to another by mere delivery and the holder for the time being is entitled to present the cheque for payment without any further formality. But if it is made payable to '*A or Order*', it must first be indorsed. Until it is indorsed it is not a complete negotiable instrument.¹ It is for *A* to indorse the cheque, and he does this by signing his name on the back.

If the indorsement consists in the mere signature of *A*, the cheque is said to be indorsed 'in blank'. It then becomes a cheque payable to bearer, that is, assignable by mere delivery, for *A* has given his order, though it is an order not mentioning any particular person. The cheque is in fact indorsed over to anyone who becomes possessed of it.

If the indorsement takes the form of an order in favour of *B*, written on the cheque and signed by *A*, i.e. '*B or Order*', it is called a 'special' indorsement. Its effect is to assign to *B* the right to demand payment of the cheque. Once again, *B* must now indorse the cheque, and he may do so specially or in blank. Thus the cheque may be assigned several times before it is ultimately presented for payment.

The important point to note is that it is the person who is *for the time being* the holder of the cheque who is entitled to claim its payment.

(b) *Bills of exchange*²

A bill of exchange is an unconditional written order, addressed by *A* to *B*, directing *B* to pay a sum of money to a specified person or to bearer. Usually this specified person is a third person, *C*, but *A* may draw a bill upon *B* in favour of himself. We must assume that the order is addressed to *B* either because he has in his control funds belonging to *A*, or is under a liability to *A*, or because he is prepared to give *A* credit; and since we are here dealing with bills of exchange merely as illustrative of negotiability, we will adopt the most usual, as it is the most convenient, form of illustration.

A directs *B* to pay a sum of money to '*C or Order*', or to '*C or Bearer*'. *A* is then called the drawer of the bill, and by

¹ The Cheques Act, 1957 (5 & 6 Eliz. II, c. 36), removes the necessity for the indorsement of cheques paid into the account of the payee, but this does not apply where it is sought to negotiate the instrument.

² For a form of a bill of exchange, viz. *infra*, Appendix C.

drawing it he promises to pay the sum specified in it either to *C* or to any subsequent holder into whose hands it may come if *B* does not 'accept' the bill or, having accepted it, fails to pay.

How accepted *B*, upon whom the bill has been drawn, is called the drawee; but when he has assented to pay the sum specified, he is said to become the 'acceptor'. Such assent (or 'acceptance') must be expressed by writing on the bill signed by the acceptor, or by his simple signature. The drawer of the bill may transfer it to another person before it has been accepted; and in that case it is the business of the transferee to present it to the drawee for acceptance. He is entitled to demand an unconditional acceptance; but he may (if he pleases) take one qualified by conditions as to amount, time, or place,¹ though this releases the drawer or any previous indorser from liability unless they assent to the qualification.

Indorsement The rules relating to payment, indorsement, and assignment by delivery are similar to those concerning cheques, and given above. In the event of default in acceptance or payment, the ultimate holder may demand payment either from the original drawer, or from any indorser; for an indorser is to all intents and purposes a new drawer, and becomes therefore an additional security for payment to the holder for the time being. If the bill has been accepted, the holder may also demand payment from the acceptor.

(c) *Promissory notes*²

Promissory notes A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.³ A Bank of England note is a promissory note which by statute is made legal tender.⁴

Bills of exchange were negotiable by the law merchant; promissory notes by 3 & 4 Anne, c. 9; both classes of instrument

¹ But by s. 19 (2) (c) of the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), a condition as to payment at a particular place is not a qualified acceptance 'unless it expressly states that the bill is to be paid there only, and not elsewhere'. Hence the common form 'accepted payable at *X* Bank' is not a qualified acceptance.

² For a form of promissory note, viz. *infra*, Appendix D.

³ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 83 (1).

⁴ Currency and Bank Notes Act, 1928 (18 & 19 Geo. V, c. 13), s. 1 (1), (2), and (3).

are now governed by the Bills of Exchange Act, 1882.¹ A cheque is in fact a species of bill of exchange, but it possesses certain features of its own not common to all bills of exchange.

(d) *Other negotiable instruments*

Certain other instruments are negotiable by the custom of merchants recognized by the Courts; such are foreign and colonial bonds expressed to be transferable by delivery,² and scrip certificates which entitle the bearer to become holder of such bonds or shares in a company,³ and, perhaps we may say, other instruments to which the character of negotiability may from time to time be attached by the custom of merchants proved to the satisfaction of the Courts. The categories of negotiable instruments are never closed.

The case of *Crouch v. Crédit Foncier of England*⁴ was formerly cited for the proposition that a mercantile custom of recent origin was insufficient to attach to an instrument the character of negotiability. But in *Goodwin v. Roberts*⁵ the Court of Exchequer Chamber questioned this decision:

Scrip was issued in England by the agent of a foreign government which entitled the holder to receive certain bonds. The plaintiff purchased some of this scrip from a broker, but allowed the broker to remain in possession of it. The broker fraudulently pledged the scrip to the defendants in order to secure a loan. The defendants took the scrip in good faith and, upon the default of the broker, sold it. If the scrip was negotiable, the defendants acquired a good title; if not, they would be liable to the plaintiff as true owner.

It was held that the scrip was negotiable according to the custom of merchants. Dealing with the argument that this was a new and unrecognized type of negotiable instrument, Cockburn C.J. said:⁶

Having given the fullest consideration to this argument, we are of the opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the

¹ 45 & 46 Vict., c. 61, as amended.

² *London Joint Stock Bank v. Simmons*, [1892] A.C. 201.

³ *Goodwin v. Roberts* (1875), L.R. 10 Ex. 337; *Rumball v. Metropolitan Bank* (1877), 2 Q.B.D. 194.

⁴ (1875), L.R. 10 Ex. 337, followed in *Bechuanaland Trading Co. v. London Trading Bank, Ltd.*, [1898] 2 Q.B. 658 and *Edelstein v. Schuler & Co.*, [1902] 2 K.B. 144.

⁵ (1873), L.R. 8 Q.B. 374.

⁶ At p. 346.

common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience. . . .

Negotiability emphasizes the interest which merchants have in dynamic security, in speedy transactions and the protection of the *bona fide* purchaser, as opposed to static security which is designed to safeguard the title of the true owner.¹ The decision in *Goodwin v. Roberts* enables the Courts to give effect to that interest.

Assignability and Negotiability

We may now endeavour to isolate the characteristics of a negotiable instrument, and to distinguish between assignability and negotiability.

Assign-
ability and
negoti-
ability dis-
tinguished
(i) Notice

In the first place, notice to the debtor is never required in the case of a negotiable instrument, whereas in the case of an assigned contract, notice is necessary to perfect a statutory assignment, and is advisable in equitable assignments so as to prevent the debtor paying the assignor. Since the benefit of the promise to pay is transferable by the mere delivery of a negotiable instrument, the right of action vests in the holder for the time being, and he need give no notice to the promisor.

(ii) Title

Secondly, the holder for the time being, provided that he takes in good faith and for value, obtains a good title to a negotiable instrument; whereas in assignment, the assignee takes 'subject to equities'. So, for example, if the instrument has been stolen, or obtained by fraud, the holder will still be entitled to demand payment if he took the instrument in good faith and for value, and without notice of any defect in title. Thus in *London Joint Stock Bank v. Simmons*:²

A broker pledged his client's bonds, which were negotiable by the custom of merchants, with a bank, to secure advances made to himself. The bank had no notice that the bonds were not his own, or that he had no authority to pledge them. He became insolvent. The bank sold the bonds in satisfaction of the debt due, and the broker's client sued the bank.

¹ Demogue, *Modern French Legal Philosophy*, p. 418.

² [1892] A.C. 201.

It was held by the House of Lords that the bank was entitled to retain and realize the securities, as it had taken the bonds for value and in good faith. 'It is', said Lord Herschell,¹ 'surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority.'

Thirdly, the doctrine of consideration does not apply to negotiable instruments in the same way as to ordinary contracts. The rule in ordinary contracts (including some contracts of assignment) is that consideration must move from the promisee.² But in the case of negotiable instruments, there is usually no consideration between remote parties to the bill, such as, for example, the acceptor and payee. Moreover it is possible for the holder of a negotiable instrument to sue, even though he himself has furnished no consideration, provided that at some time during the history of the instrument an intermediate holder has given value for it.³

This is apparent if we look at the case of an 'accommodation bill':

Suppose that *A* is in need of £100, and his own credit is not good enough to enable him to borrow; but *B* is prepared to advance the money to him, if *C*, a friend of *A*, is willing to undertake the obligation to repay it (say) in three months time.

This arrangement is carried out by means of an 'accommodation bill'. *A* draws a bill for £100 upon *C* payable to himself or order three months after date. *C* accepts the bill, and thereby undertakes to pay the bill at maturity to the person who shall then be the holder of it. *A* negotiates the bill by indorsement to *B*, who gives him £100 for it, less a 'discount' for cash. *B*, who has given value, can sue *C*, the acceptor, who has received none.⁴ But we may take the matter a stage further. *B*, who has given value, indorses the bill to *D*, who receives it as a present, giving no value for it. *D* can also sue *C*, for, once value has been

¹ At p. 217.

² Viz. *supra*, p. 86.

³ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 27 (2).

⁴ *A* will probably have induced *C* to become the acceptor of the bill by promising to provide him with funds to meet the bill when it falls due. But if he fails to do so, and *C* is called upon to meet the bill out of his own pocket, he has in effect paid money to *B* at the request of *A*, and the law thereupon implies a promise by *A* to indemnify him therefor (viz. *infra*, p. 544).

given, any subsequent holder can sue the acceptor or any other person who became a party to the bill prior to the giving of value.¹

The reason for this rule is that the law relating to negotiable instruments arose out of the custom of merchants, which assumed that the making of a bill or note was a business transaction. Value must be given at some time in the history of the instrument; but to insist that consideration should have passed between the holder and the party sued would have defeated the object for which such instruments came into existence. The object of a bill of exchange, for example, was to enable a merchant resident in one part of England to pay a creditor resident in another part of England, or abroad, without sending his debt *in specie* from one place to another. It would be useless to adhere to the strict rules of consideration in such circumstances. Nowadays, moreover, as Sir Mackenzie Chalmers pointed out, the scope of such bills has been enlarged still further:²

A bill of exchange in its origin, was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit.

(iv) **Holder in due course** Finally we may note that in the case of negotiable instruments consideration is presumed to have been given until the contrary is shown. Every holder of a completed bill of exchange is *prima facie* deemed to be 'a holder in due course'—that is, he is presumed to have given value for it in good faith, without notice of any defect in title of the person who negotiated it.³ He will therefore have to do no more than prove the signature of the person sued, everything else being presumed in his favour. The burden will be on the person sued to prove that no consideration has at any time been given.

But to this rule there is an important exception. If in an action on the bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is tainted with fraud or illegality of some kind, if, in fact, the consideration is, or is deemed to be, *illegal*, then this presumption no longer holds

¹ *Scott v. Lifford* (1808), 1 Camp. 246.

² Chalmers, *Bills of Exchange* (10th ed.), Introduction, p. xlix.

³ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 30 (2).

good. The burden of proof is shifted, and it is now the holder of the bill who must prove affirmatively that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill, though not necessarily by himself.¹ If he can do so, he will still win his action whatever the earlier history of the bill may be, unless he himself was a party to the fraud or illegality alleged. A holder who has been a *party* to the fraud or illegality can never succeed, though mere knowledge of it will not invalidate his title, if he derives his title, not from a person whose own title is defective, but from one who is himself a holder in due course.

And the effect of an illegal consideration for an indorsement should also be noticed. The indorsee cannot sue the indorser on the illegal contract made between them; but he can sue the acceptor, and probably one who indorsed the bill before illegality.²

Limitation of Negotiability

We have spoken all the time of a bill of exchange or promissory note as if it must always be a negotiable instrument. But it is to be noted that a particular bill or note is only negotiable if it is in a condition of negotiability. It may, for example, in its origin contain words prohibiting transfer, or indicating that it should not be transferable, in which case it is valid as between the parties thereto, but is not negotiable.³ Thus if a bill is made payable 'to *P* only' and further crossed 'not negotiable', it is not even transferable and only *P* can sue on it.⁴ But if a crossed cheque merely bears the words 'not negotiable', it still remains transferable, but the person to whom it is transferred takes it subject to any defect in the title of his transferor.⁵ It is also possible for a bill to be restrictively indorsed, e.g. 'Pay *Q* only', in which case *Q* has the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but it gives him no power to transfer his rights as indorsee unless the indorsement expressly authorizes him to do so.⁶

Negotiability may be curtailed

¹ *Tatam v. Haslar* (1889), 23 Q.B.D. 345.

² *Flower v. Sadler* (1882), 10 Q.B.D. 572; *Armstrong v. Gibson* (1872), 11 Amer. R. 599. *Sed quære?*

³ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 8 (1).

⁴ *Hibernian Bank, Ltd. v. Gysin and Hanson*, [1939] 1 K.B. 483.

⁵ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 81 (crossed cheques only).

⁶ *Ibid.*, s. 35 (1) and (2).

Bills of Lading¹

Bills of lading Bills of lading, which are affected both by the law merchant and by statute, possess some characteristics which call for separate consideration. They are not, in fact, negotiable instruments, but certain rights are transferred by indorsement and delivery of the bill.

Its several aspects A bill of lading may be regarded in three several aspects: (1) It is a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board; (2) it is the document which contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner (whose agent the master of the ship is); and (3) it is a 'document of title' to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still upon the high seas.

Three copies of the bill of lading are usually made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to the consignee, who (in the normal case) on receipt of it acquires a property in the goods which can only be defeated by the exercise of the right of the vendor of the goods to stop them *in transitu*.²

But if, before stoppage, the consignee lawfully transfers a bill of lading by indorsement and delivery to a holder for value, that holder has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and can claim them in spite of the insolvency of the consignee, and the consequent loss of the price of his goods by the vendor.³ But his right was, at common law, a right of property only. The assignment of a bill of lading gave a right to the goods alone; it did not give him any power to sue on the contract expressed in the bill. By the Bills of Lading Act, 1855,⁴ however, the assignment of the bill of lading transfers to the assignee not only the property in the goods, but also 'all rights of suit' and 'the same liabilities in

¹ For an example of a simple form of Bill of Lading, see Appendix B; and see generally Carver's *Carriage of Goods by Sea* (10th ed.), p. 710.

² Stoppage *in transitu* is the right of the unpaid seller who has parted with possession of the goods sold to resume possession of them as long as they are in the course of transit, and to retain them until payment or tender of the price. It may be exercised when the buyer is insolvent. See Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), ss. 44-46.

³ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 47.

⁴ 18 & 19 Vict., c. 111, s. 1.

respect of the goods, as if the contract contained in the bill of lading had been made with himself.

But a bill of lading differs from the negotiable instruments with which we have just been dealing:

Distin-
guished
from
negotiable
instru-
ments
proper

In the first place, its assignment transfers a remedy *in rem*, the right to claim specific goods, whereas a negotiable instrument confers only a remedy *in personam*, the right to be paid a certain sum of money.

Secondly, although the assignee is relieved from one of the liabilities to which the assignor is exposed, namely, the vendor's right of stoppage *in transitu*, he does not acquire proprietary rights independent of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a *bona fide* indorsee.¹ And again the contractual rights conferred by statute are expressly conferred subject to equities.²

A bill of lading, then, is a contract assignable without notice; it so far resembles a conveyance, that it gives a title to property, but it cannot give a better title, whether proprietary or contractual, than is possessed by the assignor; subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.

IV. ASSIGNMENT OF CONTRACTUAL RIGHTS AND LIABILITIES BY OPERATION OF LAW

So far we have dealt with the voluntary assignment by parties to a contract of the benefit or the liabilities of the contract. But rules of law may also operate to transfer these rights or liabilities from one to another.

The Effect of Death

The general rule is that rights and liabilities under a contract pass, on the death of a party to a contract, to his personal representatives.

Rights of
representa-
tives

But performance of such contracts as depend upon the personal service or skill of the deceased cannot be demanded

Contracts
dependent
on personal
skill or
service

¹ *Lickbarrow v. Mason* (1790) 1 H.Bl. 357, *per* Lord Loughborough at PP. 359, 360; reversed on other grounds (1794), 5 Term R. 683. But exceptions exist.

² Bills of Lading Act, 1855 (18 & 19 Vict., c. 111), s. 2.

of his representatives, nor can they insist upon offering such performance, though they can sue for money earned by the deceased and unpaid at the time of his death.¹ Contracts of agency and of personal service expire with the death of either of the parties to them; thus an apprenticeship contract is terminated by the death of the master, and no claim to the services of the apprentice survives to the executor or administrator.²

Act of 1934 With regard to rights of action for a breach of contract, the Law Reform (Miscellaneous Provisions) Act, 1934,³ provides that all causes of action subsisting against, or vested in, a person, shall survive against or for the benefit of his estate. The only qualifications to which this provision is subject in the law of contract are, that, where a cause of action survives for the benefit of a deceased person's estate, the damages are not to include any 'exemplary' damages, and in the case of a breach of promise to marry, they are to be limited to such damage, if any, to the estate of the deceased as flows from the breach of promise.⁴ The Act, however, appears to have been so worded, perhaps unintentionally, as to provide that if the deceased person is the one who *broke* the contract, his estate will be liable for the same damages as he would himself have been bound to pay if he had been living, including exemplary damages.⁵

Bankruptcy

Trustees' powers, their extent, and limits Bankruptcy is regulated by the Bankruptcy Act, 1914,⁶ which repealed and re-enacted with amendments and additions the existing statutes on the subject. Proceedings in bankruptcy commence with the filing of the petition in a Court of Bankruptcy either by a creditor alleging acts of bankruptcy against the debtor or by the debtor himself alleging inability to pay his debts. Unless this petition prove unfounded, the Court makes

¹ *Stubbs v. Holywell Railway Co.* (1867), L.R. 2 Ex. 311.

² *Baxter v. Burfield* (1746), 2 Stra. 1266.

³ 24 & 25 Geo. V, c. 41, s. 1 (1).

⁴ S. 1 (2). This phrase, however, is ambiguous. It could mean that the only damages recoverable under the Act are the same as those at common law, i.e. special damage affecting property: *Finlay v. Chirney* (1888), 20 Q.B.D. 494, at p. 504. On the other hand, it could comprehend all material loss to the estate, whether affecting person or property: *Riley v. Brown* (1928), 98 L.J.K.B. 739.

⁵ *Shaw v. Shaw*, [1954] 2 Q.B. 429.

⁶ 4 & 5 Geo. V, c. 59, as amended by the Bankruptcy (Amendment) Act, 1926 (16 & 17 Geo. V, c. 7).

a receiving order and appoints an official receiver who takes charge of the debtor's estate and summons a meeting of the creditors.

If the creditors decide not to accept a composition, but to make the debtor bankrupt, he is adjudged bankrupt and a trustee appointed. To the trustee passes all the property of the bankrupt vested in him at the time of the act of bankruptcy or acquired by him before discharge, and the capacity for taking proceedings in respect of such property; but all that we are concerned with in respect of the rights and liabilities of the trustee is to note that

- (i) Where any part of the property of the bankrupt consists of choses in action, they shall be deemed to have been duly assigned to the trustee;
- (ii) He may, within twelve months of his appointment, disclaim, and so discharge, unprofitable contracts;¹
- (iii) He is excluded from suing for personal injuries arising out of breaches of contract, such as injuries to reputation or credit;²
- (iv) Contracts personal to the bankrupt (e.g. to marry) do not pass.³

But the trustee, as statutory assignee of the bankrupt's choses in action, is not in the same position as an ordinary assignee for value; he takes only subject to all equities existing in such choses in action at the date of the commencement of the bankruptcy.⁴ If, therefore, a chose in action has been assigned for value before the bankruptcy took place, and no notice of assignment given to the debtor, the trustee cannot acquire priority over the assignee by being the first to give notice.⁵

Land

If a person acquires an interest in land from another, either Land by purchase or lease, upon terms which bind him to observe certain covenants respecting the land, the assignment by either

¹ *Ibid.*, s. 54. See also Melville (1952), 15 Mod. L.R. 28, and *infra*, p. 455.

² *Wilson v. United Counties Bank*, [1920] A.C. 102 (credit); *Re Kavanagh*, [1949] 2 All E.R. 264, affirmed [1950] 1 All E.R. 39 n. (reputation). Cf. *Beckham v. Drake* (1849), 2 H.L.C. 579 (wrongful dismissal).

³ *Gibson v. Carruthers* (1841), 8 M. & W. 321, *per* Parke B. at p. 333; *Lucas v. Moncrieff* (1905), 21 T.L.R. 683 (contract to publish book).

⁴ *Re Wallis*, [1902] 1 K.B. 719.

⁵ *Re Anderson, Ex parte New Zealand Official Assignee*, [1911] 1 K.B. 465.

party to the contract of his interest will, in certain circumstances, operate as a transfer to the assignee of the rights and obligations arising out of the covenants.¹ This subject is, however, best studied in the special works on the law of land, and is accordingly omitted here.

¹ Viz. *supra*, p. 357.

PART IV

DISCHARGE OF CONTRACT

CHAPTER XII. DISCHARGE BY AGREEMENT

CHAPTER XIII. DISCHARGE BY PERFORMANCE

CHAPTER XIV. DISCHARGE BY BREACH

CHAPTER XV. IMPOSSIBILITY OF PERFORMANCE

**CHAPTER XVI. DISCHARGE BY OPERATION OF
LAW**

CHAPTER XII

DISCHARGE BY AGREEMENT

CONTRACT rests on the agreement of the parties: as it is their agreement which binds them, so by their agreement they may be loosed. Forms of discharge by agreement

And this mode of discharge may occur in one of four ways: by rescission of a contract which is still executory; by accord and satisfaction; by the substitution of a new contract; or by the operation of some provision contained in the contract itself.

Rescission of an Executory Contract

A contract may be discharged by agreement between the parties that it shall no longer bind them. This effects a rescission of the contract, and it releases the parties from their obligations under it. Rescission

Such an agreement is formed of mutual promises, and the consideration for each promise of each party is the abandonment by the other of his rights under the contract. The rule, as often stated, that 'a simple contract may, before breach, be waived or discharged without a deed and without consideration', must be understood to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities. Where, however, the contract has been *executed* on one side, further consideration may, as we shall see, be required.

No special form is needed, even though the contract rescinded was under seal, or was one which is required by law to be evidenced in writing.

Accord and Satisfaction

At common law, the right to performance of a contract can be abandoned only by release under seal, or for consideration. Accord and satisfaction
We have already seen that where a contract is executory, consideration is clearly to be found in the relinquishment of a right by each promisee. But where the contract has been wholly executed by one party, leaving the other party still to perform his side of the obligation, as, for example, where *A* has sold

and delivered goods to *B*, but *B* has not yet paid for them, any release of *B* would be purely gratuitous since *A* would not receive any benefit, nor would *B* suffer any detriment, by this action. This distinction was emphasized by Parke B. in *Foster v. Dawber*, when he said:¹

It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by release under seal, or by performance of the obligation*, as by payment, where the obligation is to be performed by payment.

The release must therefore be under seal, or be supported by some further consideration on the part of the person seeking to be released. If these requirements are satisfied, the contract is said to be discharged by 'accord and satisfaction':

Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. *The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.*²

It must be remembered, however, that the rule in *Pinnel's Case*³ prescribes that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. So if *B* owes *A* the sum of £50 for goods sold and delivered, and *A* agrees to excuse him £45 out of this amount, the debt is not discharged by the payment of £5. But the receipt by *A* of something different in kind, or of a fixed instead of an uncertain sum, or of a lesser sum at an earlier date or in a different place than that required by the contract, is sufficient.

Formerly a contractual obligation, or cause of action arising from the breach of contract, was not discharged so long as the satisfaction remained executory, that is, so long as the new agreement had not been carried out.⁴ As it is said in an old case:⁵ 'Accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent.' But the question is now regarded as one of the construction of the agreement; and the promise

¹ (1851), 6 Ex. 839, at p. 851.

² *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616, per Scrutton L.J. at p. 643.

³ (1602), 5 Co. Rep. 117a; *supra*, p. 99.

⁴ *Peyton's Case* (1611), 9 Co. Rep. 77.

⁵ *Lynn v. Bruce* (1794), 2 H. Bl. 317, per Eyre L.C.J. at p. 319.

only, as distinct from the actual performance of it, may be a good satisfaction and discharge of the cause of action, if it clearly appears that the parties so intended.¹

It is a matter of some doubt whether the equitable principle enunciated by the House of Lords in *Hughes v. Metropolitan Railway Co.*,² and applied by Denning J. in *Central London Property Trust, Ltd. v. High Trees House, Ltd.*,³ could be successfully relied upon to obviate the necessity for further consideration in cases of common law accord and satisfaction. It has already been stated that the weak point of the doctrine of 'quasi-estoppel' may be the lack of the element of detriment to the promisee.⁴ And, in the cases to which it has so far been expressly applied, the promise giving rise to the estoppel has been one merely to suspend, and not totally to abandon, existing rights.⁵ Whether this constitutes a necessary limitation on the doctrine is not clear, but it cannot be stated with any certainty that it does not.

One important exception does, however, exist. It was a rule of the law merchant, imported into the common law, that the holder of a bill of exchange or promissory note might waive, and so discharge, his rights. Such a discharge needed no consideration, nor did it need to be expressed in any written form. The Bills of Exchange Act, 1882, section 62,⁶ has given statutory force to this rule of the law merchant, but subject to the provision that the discharge must be in writing, or the bill delivered up to the acceptor.

Substituted Contract

A contract may be discharged by such an alteration in its terms as substitutes a new contract for the old one. The old contract may be expressly waived in the new one, or waiver may be implied by the introduction of new terms or new parties. This method of discharge is therefore a form of rescission with a new contract superadded.

(a) *Substitution*

An example of the discharge of a contract by the substitution of new terms is provided by *Morris v. Baron*:⁷

¹ *Morris v. Baron*, [1918] A.C. 1; *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616.

² (1877), 2 App. Cas. 439; *supra*, p. 102.

³ [1947] K.B. 130; *supra*, p. 101.

⁵ *Supra*, p. 104.

⁶ 45 & 46 Vict., c. 61.

⁴ *Supra*, p. 103.

⁷ [1918] A.C. 1.

A dispute had arisen out of a contract for the sale of cloth and an action had been begun. Before the case came on for trial the parties made a parol arrangement of which the chief terms were that the action and counterclaim were to be withdrawn, an extension of credit was to be given to the buyer for a sum admittedly due from him under the old contract, and, as regards the balance of goods contracted for but undelivered, there was to be substituted for a firm contract of sale an option for the buyer to take them if he pleased.

The House of Lords held that in these circumstances it must be concluded that the parties had agreed to abrogate the old contract and substitute a new one for it.

Or new parties substituted Similarly the introduction of new parties may impliedly rescind an existing contract and substitute a new one for it:

Suppose that *A* has entered into a contract with *B* and *C*, and that *B* and *C* agree among themselves that *C* shall retire from the contract and cease to be liable upon it.

A may of course insist upon the continued liability of *C*; but if he continues to deal with *B* after he becomes aware of the retirement of *C*, his conduct will probably justify the inference that he has entered into a new contract to accept the sole liability of *B*, and he cannot then hold *C* to the original contract. 'If one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all three parties—the creditor, the old firm, and the new firm—be transferred to the new firm',¹ and this consent may be implied by conduct, if not expressed in words or writing.

Form of discharge by agreement As regards the form needed for the expression of an agreement which purports to discharge an existing contract, there was a general rule at common law that a contract must be discharged in the same form as that in which it was made. A contract under seal could only be discharged by agreement expressed under seal; a parol contract might be discharged by parol.

(i) In case of contracts under seal But while at common law parties to a deed could only discharge their obligations by deed, they might make a parol contract creating obligations separate from and at variance with the deed, giving a right of action to which the deed furnishes no answer, and affording an equitable answer to an action on the deed. Since the Judicature Acts the rule of

¹ *Hart v. Alexander* (1837), 2 M. & W. 484, per Parke B. at p. 493. In the case of partnership, these rules are substantially embodied in the Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 17.

equity prevails, and a contract under seal may be rescinded by a parol contract.¹

A parol or simple contract, whether it be in writing or not, may be discharged by a subsequent agreement, either written or verbal. This in no way conflicts with the rule, previously noted, that oral evidence is not admissible to vary or add to the contents of a written document, for that principle merely refers to the ascertainment of the *original* intention of the parties. It has no application to the case of a *subsequent* agreement between the parties varying the terms of the existing contract. (ii) In case of parol contracts

By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.²

Also there is no need for a written discharge even when the original agreement is one required by statute to be evidenced by writing, as in the case of contracts for the sale or disposition of land, or contracts of guarantee, for these contracts are merely rendered unenforceable by action unless they are so evidenced,³ and there is no requirement that they shall be dissolved by writing. In *Morris v. Baron*,⁴ for example, the original contract for the sale of cloth was one which was required by section 4 of the Sale of Goods Act, 1893 (now repealed) to be evidenced by writing. The substituted contract was itself unenforceable because it did not comply with that section. Nevertheless, it operated as a discharge of the old contract with the result that the buyer, who claimed damages for non-delivery of the goods alternatively under the original and under the substituted agreement, was unable to succeed on either ground.

¹ *Steeds v. Steeds* (1889), 22 Q.B.D. 537.

² *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, *per* Lord Denman C.J. at p. 64.

³ *Supra*, p. 66.

⁴ [1918] A.C. 1; *supra*, p. 397.

(b) Variation

Variation of contract It is possible that, in the second arrangement into which the parties have entered, they may merely have intended to vary the terms of the original contract, and not to rescind it and to substitute a wholly new contract for it.¹

Only important where contract required to be evidenced by writing The distinction between variation and rescission is generally unimportant except where the original contract is one required by law to be evidenced by writing. A contract under seal may be varied, as it may be rescinded, by a parol contract.² A simple contract, again, whether in writing or not, may be varied by a subsequent agreement either written or verbal.³ But a contract required by law to be evidenced by writing must be varied by writing. In *Goss v. Lord Nugent*:⁴

By an agreement in writing the plaintiff had contracted to sell to the defendant several lots of land and to make good title to them. It was afterwards discovered that a good title could not be made to one of the lots, and the defendant verbally agreed to waive the title to that lot. The defendant later, relying on the defective title, refused to pay the purchase money.

The contract being one for the sale of land, it was required to be evidenced by writing. The waiver of the defect in title would operate to vary that contract. But the Court held that the plaintiff could not rely on this variation as it was merely verbal, and the defendant was therefore entitled to succeed on the ground that a good title had not been made.

Whether there has been a mere variation of terms or a rescission must depend upon the facts of the particular case and it is not often easy to determine; but the following test has been suggested by Lord Dunedin:⁵

In the first case [variation] there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second [rescission] you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the

¹ *British and Benington's, Ltd. v. North Western Cachar Tea Co., Ltd.*, [1923] A.C. 48; *Stoljar* (1957), 35 Can. Bar Rev. 485.

² *Berry v. Berry*, [1929] 2 K.B. 316.

³ *Thornhill v. Neats* (1860), 8 C.B., N.S. 831.

⁴ (1833), 5 B. & Ad. 58.

⁵ *Morris v. Baron*, [1918] A.C. 1, at p. 26.

same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

The parties must manifest a 'clear intention' to discharge the contract;¹ the changes must go to the 'very root' of the original agreement.²

(c) *Forbearance or waiver*

An alteration in the mode of performance, or a postponement of the time when performance is to take place, if made for the convenience of one of the parties and at his request, does not either discharge or vary the contract. This is known as forbearance, or waiver, by the party who accedes to the request.

Alteration of mode, or post-ponement of performance

This question has often arisen in contracts for the sale of goods, where the delivery is to extend over some time. The purchaser verbally requests the vendor to postpone delivery of the goods and the vendor grants this request. Before the curtailment of the Statute of Frauds,³ the situation could be said to bristle with legal difficulties. Most of them have now been removed, but it is still necessary briefly to discuss the problems which might arise. In the first place, under section 4 of the Sale of Goods Act, 1893 (now repealed), if the contract was one for the sale of goods of the value of £10 and upwards, it was required to be evidenced by writing. The purchaser might therefore refuse to accept the goods at all, alleging that the contract had been discharged by the verbal alteration of the time of performance, that a new contract was thereby created, and that the new contract is unenforceable for non-compliance with the statutory requirements as to form.⁴ Alternatively, the vendor might attempt to hold the purchaser liable for breach, on the ground that the oral indulgence constituted a variation of the original agreement, but that this variation was nugatory as it was not in writing.⁵

Difficulties as to (i) form

Secondly, the postponement was open to the technical objection that it had no binding force since it was gratuitous and made without consideration. As it was made at the request of the promisee and for his convenience, without any corresponding benefit to the promisor, the element of consideration was lacking. It would therefore be without legal effect.

and (ii) consideration

¹ *Ibid.*, per Lord Atkinson at p. 33.

² *British and Benington's, Ltd. v. North Western Cachar Tea Co., Ltd.*, [1923] A.C. 48, per Lord Sumner at p. 68.

³ *Supra*, p. 66.

⁴ *Morris v. Baron*, [1918] A.C. 1; *supra*, p. 399.

⁵ *Noble v. Ward* (1867), L.R. 2 Ex. 135.

Variation
and mere
forbearance
distinguish-

In order to overcome these difficulties, and so that the statute might not become a cloak for fraud, the Courts drew a distinction between variation (or discharge) on the one hand and mere forbearance on the other. Whereas the former might, in the cases previously mentioned, be required to be in writing, an oral forbearance would be efficacious although not in the statutory form. In *Levey & Co. v. Goldberg*,¹ for example:

The defendant agreed in writing to buy from the plaintiff certain cloth over £10 in value, delivery to be made within a specified time. At the request of the defendant, the plaintiff orally consented to extend the time of delivery. Subsequently, however, before delivery was made, the defendant repudiated the contract saying that the plaintiff was never ready and willing to deliver the cloth within the contract time or within a reasonable time, and pleading the Sale of Goods Act, s. 4, as a defence.

It was held that the forbearance by the plaintiff at the request of the defendant to deliver within the defined period did not constitute a variation but was a valid and effective waiver although not in writing. The defendant was therefore liable for his failure to accept the cloth. The distinction between variation and forbearance is, however, both vague and artificial, being merely designed to avoid the awkward consequences of the Statute.² It is, fortunately, now much less important since the passing of the Law Reform (Enforcement of Contracts) Act, 1954.³

Waiver
does not
require
considera-
tion

As to the point concerning consideration, the Courts seem always to have held that the waiver of a contractual condition by one party at the request of the other is valid and binding even though this element is not present. The party granting the indulgence cannot go back on his promise and insist on his strict contractual rights.⁴ He can, however, in cases of postponement of performance, by giving reasonable notice to the promisee, require the contract to be performed within a new time limit,⁵ or, if no new time is fixed, within a reasonable time.⁶ Similarly in cases of the waiver of other types of contractual condition, he can, with reasonable notice, revert to the original

¹ [1922] 1 K.B. 688; *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272; *Hickman v. Haynes* (1875), L.R. 10 C.P. 598.

² Compare, for example, *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58 with *Hickman v. Haynes* (1875), L.R. 10 C.P. 598.

³ 2 & 3 Eliz. II, c. 34; *supra*, p. 66.

⁴ *Bentzen v. Taylor, Sons & Co.*, [1893] 2 Q.B. 274.

⁵ *Charles Rickards, Ltd. v. Oppenheim*, [1950] 1 K.B. 616.

⁶ *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272.

contractual stipulation; but he cannot treat the forbearance as of no effect. In *Panoutsos v. Raymond Hadley Corporation of New York*.¹

The plaintiff and defendants entered into a contract for the sale and shipment to Greece of 4,000 tons of flour. Delivery was to be made by means of separate shipments, and payment was to be effected by the plaintiff opening a bankers' confirmed credit in the defendants' favour. The plaintiff did open a credit, but it was not 'confirmed'. The defendants made some shipments and received payment for these by this credit. Subsequently, however, they summarily repudiated the remainder of the contract on the ground that the credit was not in accordance with the contractual stipulation. The plaintiff sued for breach.

It was held that the defendants, by their acceptance of payment by means of the unconfirmed credit, had impliedly waived this condition in the contract. This, however, did not mean that they were consequently bound to accept that credit until the end of the contract; they might, by giving reasonable notice, insist on the strict contractual terms. But they were not entitled to cancel the contract in a summary manner.

The party at whose request the forbearance is granted is also bound by its terms. Moreover, if he asks to have the performance of the contract postponed, he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the later date, the measure of damages may be increased, as against him, by the addition of damages consequent on the delay.²

The doctrine of forbearance is a common law doctrine. But it will be remembered that equity also is prepared to intervene in similar circumstances.³

It is [said Lord Cairns]⁴ the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.

¹ [1917] 2 K.B. 473.

² *Levy & Co. v. Goldberg*, [1922] 1 K.B. 688.

³ *Viz. supra*, p. 101.

⁴ *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439, at p. 448.

The party who has promised the forbearance will be estopped from going back on his promise, at any rate without giving fair and adequate notice to the promisee.

The similarity between the common law and equitable doctrines is so striking that it is tempting to regard both as a species of estoppel. This was in fact the view taken by Denning L.J. in *Charles Rickards, Ltd. v. Oppenheim*:¹

The defendant ordered from the plaintiffs a Rolls Royce car chassis, which was delivered to him. He wished to have a body built on the chassis, and the plaintiffs accepted this order. The job was to be completed by March 20, 1948, at the latest. On that day it was still not completed, but the plaintiff continued to press for delivery. On June 29, however, he wrote to the plaintiffs and told them he would not take delivery after July 25. The plaintiffs still having failed to deliver the car, the defendant repudiated the contract.

The Court of Appeal held that he was entitled to do so. Although by his conduct he had impliedly waived the original stipulation as to time, he had given reasonable notice of his intention to reimpose a new time limit. The plaintiffs having failed even then to perform the contract, it was clearly discharged by their breach. Denning L.J. said of the defendant's consent to postponement:²

Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

This is consistent with his frequently expressed view that 'we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations'³, but it would seem that, in this particular instance, the common law has reached the same conclusion as equity by its own unaided efforts.

Provisions for Discharge Contained in the Contract Itself

Provisions
in contract
itself

A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances.

¹ [1950] 1 K.B. 616; Cf. *Stoljar* (1957), 35 Can. Bar Rev. 485.

² At p. 623.

³ *Lyle-Meller v. A. Lewis & Co. (Westminster), Ltd.*, [1956] 1 W.L.R. 29, at p. 35; *Guest* (1956), 30 Aust. L.J. 187; *Fridman* (1957), 35 Can. Bar Rev. 279.

We have already seen that a contract may be made by the parties subject to a 'condition subsequent'.¹ They may agree that in the event of the fulfilment or non-fulfilment of a certain condition or upon the occurrence of a certain event, they are to be mutually discharged from their obligations. Sometimes this discharge is automatic, as in the case of the 'excepted risks' clauses of a charter-party; sometimes it is only to take place at the option of one of the parties, as in *Head v. Tattersall*² where the buyer was given the option of returning the horse bought if it did not come up to the required standard. But in both cases the provision for discharge is contained in the contract itself.

Conditions
subsequent

A continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision is implied by custom in the ordinary contract of domestic service, which can be terminated either by a month's notice or the payment of a month's wages.³ Similar terms may be incorporated in other contracts between employer and employed, either expressly or by the usage of a trade;⁴ and even where the duration of a written contract is on the face of the instrument indefinite and unlimited, such a provision may sometimes be implied from the nature of the contract.⁵ Thus a partnership for no fixed time is determinable by notice.⁶

Discharge
optional
with notice

¹ *Supra*, p. 111.

² (1871), L.R. 7 Ex. 7; *supra*, p. 111.

³ *Nowlan v. Ablett* (1835), 2 C., M. & R. 54.

⁴ *Parker v. Ibbetson* (1858), 4 C.B., N.S. 346.

⁵ *Crediton Gas Co. v. Crediton U.D.C.*, [1928] 1 Ch. 447; *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.*, [1948] A.C. 173; *Martin-Baker Aircraft Co., Ltd. v. Canada Flight Equipment, Ltd.*, [1955] 2 Q.B. 556.

⁶ Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 26.

CHAPTER XIII

DISCHARGE BY PERFORMANCE

Kinds of
performance:

WE must distinguish performance which discharges one of two parties from his liabilities under a contract, and performance which discharges the obligation in its entirety.

Where
promise is
given for
executed
considera-
tion

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract: all has been done on both sides that could be required to be done under the contract.

where
promise
is given for
promise

Where one promise is given in consideration of another, performance by one party does no more than discharge him who has done his part. Each must have done his part in order that performance may be a *solutio obligationis*, and so if one has done his part and not the other, the contract is still in existence and may be discharged in any one of the ways we have mentioned.

Mode of Performance

Perform-
ance of con-
tract

Whether the alleged performance is a discharge to the party concerned must be a question to be answered, first by ascertaining the *construction* of the contract, so as to see what the parties meant by performance, and then by ascertaining the facts, so as to see whether that which has been done corresponds to that which was promised.

must be
precise and
exact

The general rule is that performance must be precise and exact. If there is the slightest deviation from the terms of the contract, the party not in default will be entitled to sue for damages, or, in certain cases, to elect to treat the contract as discharged. In *Moore & Co. v. Landauer & Co.*:¹

The defendants agreed to buy from the plaintiffs 3,000 tins of canned fruit from Australia to be packed in cases each containing 30 tins. When the goods were tendered it was found that a substantial part of the consignment was packed in cases containing 24 tins.

They were held entitled to reject the whole consignment. In a contract for the sale of goods, the delivery to the buyer of a quantity of goods larger or smaller than that contracted for will

¹ [1921] 2 K.B. 519.

normally give him the right to reject them.¹ The only qualification would seem to be that where the deviation is 'microscopic', the contract must be taken to have been correctly performed, for *de minimis non curat lex*.²

Payment

One mode of performance of an obligation is by payment. Payment as a mode of discharge

Payment may be a discharge of the original contract between the parties, or of an agreement substituted for such a contract:

If in a contract between *A* and *B* the liability of *B* consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges *B* by the performance of his agreement. of original contract,

Or if *B*, being liable to perform various acts under his contract, wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with *A* to accept the proposed payment in lieu of that to which he may be entitled under the original contract. The new contract discharges the old one, and payment is a performance of *B*'s duties under the new contract, and, for him, a consequent discharge. of substituted contract,

Again, where one of the parties has made a default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation thus formed may be discharged by an agreement the consideration for which is usually (but not necessarily) a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.³ of liability arising from breach

Payment, then, may be performance (1) of an original contract, or (2) of a substituted contract, or (3) of a contract in which payment is the consideration for the renunciation of a right of action.

A negotiable instrument may be given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it; and the giving of such an instrument in payment of a liquidated or unliquidated claim is the substitution of a new agreement for the old one; but it may affect the relations of the parties in one of two different ways. The giver of the instrument may be discharged from his previous obligation either absolutely or conditionally. Negotiable instrument as payment

One party may take the bill or note, and promise, in consideration of it, expressly or impliedly to discharge the other may be an absolute

¹ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 30 (1).

² *Arcos, Ltd. v. E. A. Ronaasen & Son*, [1933] A.C. 470, per Lord Atkin at p. 480.

³ Viz. *infra*, p. 489.

altogether from his existing liabilities. In such a case he relies upon his rights conferred by the instrument, and, if it is dishonoured, he must sue on it, and cannot revert to the original cause of action.¹ But the presumption, where a negotiable instrument is taken in lieu of a money payment, is that the parties intend it to be a conditional discharge only:

Suppose that *A*, having certain rights against *B*, has agreed to take a cheque instead of immediate payment or immediate enforcement of his right of action.

or conditional discharge So far *B* has satisfied *A*'s claim; but if the cheque is dishonoured, the consideration for *A*'s promise has wholly failed and his original rights are restored to him. The agreement is 'defeasible upon condition subsequent'; the payment by *B* which is the consideration for the promise by *A* is not absolute, but may turn out to be, in fact, no payment at all.²

Payment, then, consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of evidence to the contrary) that, if payment is not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.

Tender

Tender is of two kinds Tender is attempted performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is prevented by the act of the party for whose benefit it is to take place.

Tender of goods Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and

¹ *Sard v. Rhodes* (1836), 1 M. & W. 153; *Re Romer & Haslam*, [1893]

² Q.B. 286, *per* Lord Esher M.R. at p. 296; Chalmers' *Bills of Exchange* (12th ed.), p. 305; Byles' *Bills of Exchange* (21st ed.), p. 314.

³ *Bayer v. Wagstaff* (1844), 14 L.J.Ch. 116; *Re Romer & Haslam*, [1893] 2 Q.B. 286.

may either maintain or successfully defend an action for breach of the contract. In *Startup v. Macdonald*:¹

The plaintiffs agreed to sell and deliver to the defendant a certain quantity of oil 'within the last fourteen days of March'. At 8.30 p.m. on the 31 March (a Saturday) they tendered delivery. This was refused on the ground that the hour was too late.

It was held that this was nevertheless a valid tender in accordance with the terms of the contract. The defendants were therefore liable for damages for non-acceptance. The Sale of Goods Act, 1893, section 37,² provides that when the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, the buyer must do so within a reasonable time or become liable for any loss occasioned to the seller by his neglect. But this does not affect the rights of the seller where the non-acceptance amounts to a repudiation of the contract.

Where, however, the performance due consists in the pay-^{Tender of money}ment of a sum of money, a tender by the debtor, although it may form a good defence to an action by the creditor, does not constitute a discharge of the debt. The debtor is bound in the first instance 'to find out the creditor and pay him the debt when due';³ if the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into Court.⁴ If he proves his plea, the plaintiff gets nothing but the money originally tendered to him, while the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender.

Tender of payment, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. And the tender must be an offer of money produced and accessible to the creditor,⁵ not necessarily of the exact sum, but of such a sum

¹ (1843), 6 M. & G. 593. Under s. 29 (4) of the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. ² 56 & 57 Vict., c. 71.

³ *Walton v. Mascall* (1844), 13 M. & W. 452, per Parke B. at p. 458.

⁴ *Dixon v. Clark* (1848), 5 C.B. 365, at p. 377; R.S.C., Ord. 22, r. 3.

⁵ The Statutes which define legal tender are these: The Bank of England Act, 1833 (3 & 4 Will. IV, c. 98), s. 6, and the Currency and Bank Notes Act, 1928 (18 & 19 Geo. V, c. 13) which enact that Bank of England notes are legal tender, those for £1 and 10s. being legal tender even by the Bank itself; and the Coinage Act, 1870 (33 & 34 Vict., c. 10), s. 4, which enacts that the coinage

as will allow the creditor to take exactly what is due without being called upon to give change.¹ Formerly it was necessary to produce the cash to the creditor in person. 'Great importance', it was said,² 'was attached to the production of money, as the sight of it might tempt the creditor to yield.' But it is probable that a genuine offer to pay will now be regarded as a good tender.³

Time of Performance

Where a time was fixed for the performance of his undertaking by one of the parties to the contract, the common law held this to be 'of the essence of the contract'. If the condition as to time were not fulfilled, the other party might treat the contract as broken and discharged.

Equity did not so regard a condition as to time, but inquired whether the parties, when they fixed a date, meant anything more than to secure performance within a reasonable time. If this was found to be their intention, the contract was not held to be broken if the party who was bound as to time did perform, or was ready to perform, his contract within a reasonable time.

Since the passing of the Judicature Acts, the rule of equity is now also the rule of law, for section 41 of the Law of Property Act, 1925,⁴ enacts:

Stipulations in a contract, as to time or otherwise, which according to the rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.

But this relief seems to be confined to those situations in which the Court of Chancery would previously have intervened, i.e. where the contract can be enforced by specific performance.⁵ It does not apply to mercantile contracts, and, further, there were three cases in which equity itself would refuse its aid:

- (1) where the agreement expressly states that time is of the essence of the contract;⁶

of the Mint shall be legal tender as follows: gold coins, to any amount; silver coins, up to forty shillings; bronze coins, up to one shilling.

¹ Provided that he objects to giving change.

² *Finch v. Brook* (1834), 1 Bing. N.C. 253, *per* Vaughan J. at p. 257.

³ *Farquharson v. Pearl Assurance Co., Ltd.*, [1937] 3 All E.R. 124.

⁴ 15 & 16 Geo. V, c. 20, re-enacting s. 25 (7) of the Judicature Act 1873 (36 & 37 Vict., c. 66).

⁵ *Snell's Principles of Equity* (24th ed.), p. 556.

⁶ *Steedman v. Drinkle*, [1916] 1 A.C. 275.

- (2) where time was not originally of the essence of the contract, but has been made so by one party giving reasonable notice to the other, who has failed to perform the contract with sufficient promptitude;¹
- (3) where from the nature of the contract or of its subject-matter, time must be taken to be of the essence of the agreement. Thus in the case of the sale of a public-house as a going concern,² or of property of fluctuating value,³ equity did not permit relief.

The Sale of Goods Act, 1893, section 10 (1),⁴ provides that, unless a different intention appears from the terms of the contract, stipulations as to time of *payment* contained in a contract for the sale of goods are not to be deemed of the essence of the contract. Whether any other stipulation as to time is of the essence of the contract or not depends upon the terms of the contract; but it is usually held to be so.⁵

¹ *Stickney v. Keeble*, [1915] A.C. 386; *Finkelkraut v. Monihan*, [1949]

² All E.R. 234.

³ *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705.

⁴ *Harold Wood Brick Co. v. Ferris*, [1935] 2 K.B. 198.

⁵ 56 & 57 Vict., c. 71.

⁵ *Reuter v. Sala* (1879), 4 C.P.D. 239, at pp. 246, 249.

CHAPTER XIV

DISCHARGE BY BREACH

Breach of contract

IF one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise—a right of action conferred upon the party injured by the breach. Besides this, there are circumstances in which the breach not only gives rise to a cause of action but will also discharge the injured party from such performance as may still be due from him.

Does not itself discharge, but may confer option on injured party

In such cases it is common, but it is not strictly accurate, to speak of the *contract* as having been discharged by the breach. This phrase, though convenient, is a loose one. A breach does not, of itself, alter the obligations of either party under the contract; what it may do is to justify the injured party, if he chooses, in regarding himself as absolved or discharged from the further performance of the contract.¹ It does not automatically terminate his obligation; he has the option either to treat the contract as still in existence or to regard himself as discharged.

It is often difficult to ascertain whether or not a breach of one of the terms of a contract gives such an option to the party who suffers by it. But the general principle is, in the words of Lord Blackburn, this:²

Where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct'.

Modes in which the right may arise

We have therefore to ask: What are the circumstances which give rise to this situation? What is the nature of the breach

¹ *Heyman v. Darwins, Ltd.*, [1942] A.C. 356—even where the contract has been repudiated, and the repudiation accepted, it cannot be said to have ceased for all purposes. It still 'survives', for example, for the purpose of ascertaining the damages due under the terms of an arbitration clause contained in the contract itself.

² *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, at p. 443. It does not matter, however, if the party electing to treat the contract as discharged does so on insufficient grounds, provided that the real facts do actually justify his course of action: *Ridgway v. Hungerford Market Co.* (1835), 3 Ad. & E. 171.

which gives the injured party the right to treat himself as absolved from future performance under the contract?

The right to treat a contract as wholly discharged may arise in any one of three ways: the other party to the contract (1) may renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfil them, (3) may fail to perform what he has promised.¹ In each of these three cases he has repudiated his contractual obligations. In the first case, he has expressly repudiated them; in the second, he has repudiated them by conduct; in the third, he has repudiated them by a total or substantial failure to perform them, and not the less so because his failure may not have been wilful or deliberate. In each case, provided that the repudiation goes, in the words of Lord Blackburn, 'to the root of the contract'—a phrase the meaning of which we shall consider later—the injured party may treat his own obligations as ended.

Of these forms of breach the first two may take place not only in the course of performance but also while the contract is wholly executory, i.e. before either party is entitled to demand a performance by the other of his promise. In such a case the repudiation is sometimes known as 'anticipatory breach'.² The last can, of course, only take place at or during the time for the performance of the contract.

Renunciation

This may take place either before performance is due or during performance itself. Renunciation

(a) Before performance is due

The parties to a contract which is wholly executory have a right to something more than the performance when the time arrives. They have a right to the maintenance of the contractual relation right up to that time, as well as to a performance of the contract when due. before performance due

The renunciation of a contract by one of the parties before the time for performance has come does not, of itself, put an end to the contract, for there must be two parties to a rescission; may be accepted

¹ This statement of the law was approved by Lord Porter in *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, at p. 397 and by Devlin J. in *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401, at p. 436.

² On the general nature of 'anticipatory breach' see Devlin J. in *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401, affirmed [1957] 1 W.L.R. 979.

but it discharges the other, if he so chooses, and entitles him at once to sue for a breach. A contract is a contract from the time it is made, and not from the time that performance is due. The leading case upon this subject is *Hochster v. De la Tour*:¹

The defendant engaged the plaintiff on the 12th of April to enter into his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June. On the 11th of May the defendant wrote to the plaintiff to inform him that his services would no longer be required. The plaintiff at once brought an action, although the time for performance had not yet arrived.

The Court held that he was entitled to do so.

The rule has also been applied to situations where the performance is not absolute as in *Hochster v. De la Tour*, but contingent. In that case a time was fixed for performance, and before it arrived the defendant renounced the contract, but in *Frost v. Knight*,² performance was contingent upon an event which might not happen within the lifetime of the parties:

The defendant, a bachelor, promised to marry the plaintiff upon his father's death; but during his father's lifetime he renounced the contract.

The plaintiff was held entitled to sue on the ground explained above. The sense of the rule was very clearly stated by Cockburn C.J.:³

The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its unimpaired and unimpeached efficacy may be essential to his interests.

or refused
at risk of
promisee If, however, the promisee refuses to accept the renunciation, and continues to insist (as he has a right to do) on the performance of the promise, the contract remains in existence for the benefit of both parties, but at the risk of the promisee; if anything occurs subsequently to discharge it from other causes, the promisor, whose renunciation has been refused, may nevertheless take advantage of such discharge. Thus in *Avery v. Bowden*:⁴

¹ (1853), 2 E. & B. 678.

² (1872), L.R. 7 Ex. 111.

³ At p. 114.

⁴ (1855), 5 E. & B. 714, (1856), 6 E. & B. 953; *Hochster v. De la Tour* (1853), 2 E. & B. 678, at p. 688.

agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but the defendant's agent was unable to supply one. Despite this refusal to load, the master of the ship continued to demand a cargo, but before the specified number of days had elapsed the Crimean war broke out between England and Russia and the performance of the contract became legally impossible. The plaintiff afterwards sued for breach of the charter-party.

His action failed. Although the days in which the plaintiff was entitled to load the cargo had not expired, the master of the ship might have treated the refusal to load as a repudiation of the contract and sailed away. The plaintiff would then have had the right to sue at once upon the contract. But since the master had not accepted the renunciation, there had been no actual failure of performance before war broke out, and so the defendant was entitled to take advantage of the discharge of the contract brought about by the declaration of war.

(b) *During performance*

If during the performance of a contract one of the parties by word or act definitely refuses to continue to perform his contract in some essential respect, the other party is forthwith exonerated from any further performance of his promise, and is at once entitled to bring his action. Renunciation during performance

In *Cort v. The Ambergate Railway Company*:¹

The plaintiff contracted with the defendant Company to supply them with 3,900 tons of railway chairs at a certain price, to be delivered in certain quantities at specified dates. After 1,787 tons had been delivered, the Company desired Cort to deliver no more, as they would not be wanted. He brought an action upon the contract, averring that he was always ready and willing to perform his part, but had been prevented from doing so by the action of the Company.

He obtained a verdict, and when the company moved for a new trial on the ground that he should have proved not merely that he was ready and willing to deliver, but an actual delivery, the Court held that, where a contract was renounced by one of the parties, the other need only show that he was willing to have performed his part.

When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion

¹ (1851), 17 Q.B. 127.

for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract.¹

*Impossibility Created by the Act of One
Party to the Contract*

Impossibility If one party, by his own act,² renders his promise impossible of performance, he will be considered impliedly to have repudiated the contract, even though he has not expressly renounced his intention to fulfil it. Here also the impossibility may be created either before performance is due or in the course of performance.

(a) Before performance is due

created before performance due If a promisor, before the time for performance arrives, makes it impossible that he should perform his promise, the effect is the same as though he had renounced the contract at that time.

In *Lovelock v. Franklyn*:³

The defendant promised to assign to the plaintiff, within seven years from the date of his promise, all his interest in a lease for the sum of £140. Before the end of seven years he assigned his interest to another person.

It was held that the plaintiff need not wait until the end of the seven years to bring his action:⁴

The plaintiff has a right to say to the defendant: 'You have placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years; and, during that period, I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but, if I now were to tender you the money, you would not be ready.' That is a breach of the contract.

The same rule was also applied in *Omnium D'Enterprises v. Sutherland*:⁵

The defendant chartered a ship to the plaintiff, the ship to be placed at the plaintiff's disposal as soon as she was released from the Government service in which she was at the time engaged. Before her release, the defendant sold her to another person.

¹ (1851), 17 Q.B. 127, *per* Lord Campbell C.J. at p. 148.

² If the impossibility arises through the occurrence of some external event, the contract is discharged by frustration unless the obligation is an absolute one; *viz. infra*, pp. 427, 443.

³ (1846), 8 Q.B. 371.

⁴ *Ibid.*, *per* Lord Denman C.J. at p. 378.

⁵ [1919] 1 K.B. 618. See also *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524 and *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401.

It was argued on behalf of the defendant that he might have bought the ship back in time to place her at the plaintiff's disposal, but this was regarded by the Court as too speculative a possibility to take into account.¹ By his sale of the ship, the defendant had put it out of his power to perform thereafter his contract with the plaintiff: the contract was at an end and the plaintiff might bring an action for damages forthwith.

(b) *During performance*

The rule of law is similar in cases where one party during performance has by his own act made the complete performance of the contract impossible.

Impossibility created during performance

This is illustrated by the case of *O'Neil v. Armstrong*:²

The plaintiff, a British subject, was engaged by the captain of a warship owned by the Japanese government to act as a fireman on a voyage from the Tyne to Yokohama. In the course of the voyage the Japanese government declared war with China. The plaintiff was informed that a performance of the contract would bring him under the penalties of the Foreign Enlistment Act. He consequently left the ship, and sued the master for the wages agreed upon.

It was held that he was entitled to succeed in his action, for the act of the defendant's principals, the Japanese government, had made his performance of the contract legally impossible.

Failure of Performance

When one party to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from performance. One of two parties is not required to render performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised.

Breach may discharge

But one of the parties may claim that though he has broken a promise wholly or in part, yet his breach does not entitle the other to rescind the contract and to regard himself as discharged from his own liabilities under it. In order to determine if this is so, it is necessary to ask two questions: (1) whether performance of his promise by the party injured was condi-

or only give a right of action

¹ It may be noted that in this case the buyer of the ship had no notice of the charter-party at the time of the sale. If there had been notice, it seems that the plaintiff might have enforced the charter-party against the buyer on the principle of the *Strathcona Case*: [1926] A.C. 108; *supra*, p. 413.

² [1895] 2 Q.B. 418; *Ogdens, Ltd. v. Nelson*, [1905] A.C. 109.

tional upon the performance of his promise by the party in default, and (2) whether the promise of the party in default was 'divisible' in the sense that something less than complete performance will suffice.

(a) *Are the promises interdependent?*

Interdependence of promises

If the promise of the party injured was given conditionally on the performance by the other of that in which he has made default, he is discharged from his promise: if it was not, he must perform his promise, and bring an action for the damage occasioned by the default of the other.

Concurrent conditions

If the parties agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the obligation to perform each promise is dependent or conditional on this concurrence of readiness and willingness to perform the other; their mutual promises are *concurrent conditions*. Thus section 28 of the Sale of Goods Act, 1893,¹ provides that in a contract for the sale of goods:

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Failure to tender the goods discharges the buyer from his obligation to pay the price; failure to tender the price discharges the seller from his obligation to deliver the goods.

Conditions precedent

Similarly, if the parties agree that the performance of one promise is to be conditional on the prior performance of the other, then the performance of the latter promise is a *condition precedent* to the obligation to perform the other. In *Cutter v. Powell*,² for example:

A seaman was engaged to act as second mate on a voyage from Jamaica to Liverpool. He was to be paid thirty guineas in one lump sum after the completion of the voyage. Nineteen days out from Liverpool, when the voyage was nearly completed, he died. His widow sued to recover a proportion of the agreed sum.

Her action failed. The contract was construed to mean that if the voyage was completed he was to receive thirty guineas,

¹ 56 & 57 Vict., c. 71.

² (1795), 6 Term R. 320; Glanville Williams (1941), 57 L.Q.R. 373, 490; Stoljar (1956), 34 Can. Bar Rev. 288.

but, if it was not, he was to receive nothing. The performance of his obligation was a condition precedent to payment being made, and the defendant was consequently absolved from his duty to pay the widow.

If, therefore, the defaulting party has broken a promise which falls into one of these two classes, the breach will relieve the other of the obligation to keep his own promise and enable him to treat the contract as at an end. But if the promises are *independent* of each other, he must perform his part and sue for damages for breach. His promise continues to bind him despite the failure to perform by the other party. The tendency of the Courts is against construing a contract in this way, but there are some well-recognized exceptions. Thus a tenant's covenant to pay rent is quite independent of a landlord's covenant to repair; he cannot withhold payment on the ground that the landlord has failed to carry out his side of the obligation.¹ Similarly a covenant by a husband in a separation deed to pay his wife maintenance is generally independent of any covenant on her part, e.g. not to molest him.² And in the case of contracts of apprenticeship, the covenants of the master and of his apprentice are, though with certain exceptions, independent of each other.³ Normally, however, the contrary rule applies. An employee is not bound to observe a covenant in restraint of trade when he has been wrongfully dismissed by his employer;⁴ a buyer is not bound to pay for goods unless they are delivered to him in accordance with the contract.⁵

(b) *Divisible promises*

Even where the obligation of one party is dependent or conditional upon the fulfilment of his promise by the other, it is not every failure of performance by the party in default that will entitle him to put an end to the contract. The promise which has been broken may be a 'divisible' promise, in the sense that it is capable not only of complete performance, but of performance to a greater or lesser degree. It may, for example, be a complex obligation, composed of several undertakings differing in character or importance; or it may be a promise to do a number of successive acts; or to do a single act which is

¹ *Taylor v. Webb*, [1937] 2 K.B. 283.

² *Fearon v. Earl of Aylesford* (1884), 14 Q.B.D. 792.

³ *Winstone v. Linn* (1823), 1 B. & C. 460. Cf. *Ellen v. Topp* (1851), 6 Ex. 424.

⁴ *General Billposting Co. v. Atkinson*, [1909] A.C. 118.

⁵ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), ss. 27, 28, 30.

capable of being partly done and partly left undone. Here the *degree* of default is most material. A failure by one party to perform a part of his promise will give a right of action to the other; but it will not necessarily discharge the innocent party from the performance of his own obligations under the contract. We have therefore to inquire what degree of failure of performance will entitle him to say that the consideration for which he made his promise has in effect wholly failed and that he will not, and is not bound to, perform that which he had undertaken to do.¹

Failure must go to root of contract The general rule is, as we have seen, that the failure must go to the root of the contract, to the foundation of the whole.² But it is also material to consider whether the conduct of the party in default, when viewed against the background of the contract and of its purpose, is such that it shows an intention no longer to be bound.³ These may be said to be the objective and subjective aspects of the problem. We must now consider their application to contracts for delivery and payment by instalments, to incomplete performance of divisible contracts, and to warranties and conditions.

(i) Delivery and payment by instalments The best illustrations of divisible promises are to be found in contracts to deliver and pay for goods by instalments. Where these are numerous, and extend over a long period, a default either of delivery or payment does not necessarily discharge the contract, though it must, of course, in every case give rise to an action for damages.⁴

Failure to accept In *Simpson v. Crippin*⁵ it was agreed that 6,000 to 8,000 tons of coal should be delivered in equal monthly instalments during a period of twelve months, the buyer to send wagons to receive the coal: the buyer sent wagons for only 158 tons in the first month, but the seller was not held entitled to rescind the contract. In *Freeth v. Burr*⁶ there was a failure on the part of the buyer to pay for one instalment of several deliveries of iron,

or to pay may not discharge contract

¹ Glanville Williams (1941), 57 L.Q.R. 373, 490.

² The failure must be such as to 'frustrate the commercial purpose of the venture'. See Scrutton on *Charterparties* (16th ed.), p. 93, and *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401, at p. 431, affirmed [1957] 1 W.L.R. 436.

³ *Universal Cargo Carriers Corporation v. Citati* (*supra*) at p. 436.

⁴ See s. 31 (2) of the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), where it is stated that 'it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach. . . .' Viz. *supra*, p. 116.

⁵ (1872), L.R. 8 Q.B. 14.

⁶ (1874), L.R. 9 C.P. 208.

under an erroneous impression that he was entitled to withhold payment as a set-off against damages for non-delivery of an earlier instalment. The seller was not discharged.

Again in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*¹

The respondents bought from the appellant company 5,000 tons of steel, to be delivered at the rate of 1,000 tons each month commencing January, 1881, payment to be made within three days of the receipt of the shipping documents. The company delivered part only of the first instalment in January, but delivered another in February. Shortly before payment for these was due, a petition was presented for the winding up of the appellant company, whereupon the respondents refused payment as they had been erroneously advised not to do so without leave of the Court. The appellant company informed the respondents that they would treat this refusal as breach, but the respondents continued to express their willingness to take delivery and to make the payments if possible.

The House of Lords held that the contract could not be rescinded by the appellants. The Earl of Selborne L.C. said:²

I cannot ascribe to their [the respondents'] conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed.

Lord Blackburn adopted a more objective approach:³

There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason, but it did not go to the root or essence of the contract.

In none of the cases just cited did the breach, in the particular circumstances in which it had been committed, indicate, in the view taken by the Court, an intention in the party in fault to throw up the contract altogether, and thereby to set the other party free. On the other hand, if the breach is more than a trivial one, if it strikes at the basis of the contract, or if there is a serious likelihood that it will be repeated,⁴ the Court may infer an intention on the part of the party in default to repudiate the contract altogether. Thus in *Honck v. Muller*:⁵

but failure
to take
delivery
may do so
if not
trivial

The plaintiff, in October, 1879, bought from the defendant 2,000 tons of pig iron to be delivered 'in November, 1879, or equally over November, trivial

¹ (1884), 9 App. Cas. 434.

² At p. 441.

³ At p. 444.

⁴ *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 148, at p. 157.

⁵ (1881), 7 Q.B.D. 92.

December and January next at 6*d.* per ton extra.' He failed to take delivery of any iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused, and gave notice that he considered the contract discharged.

The plaintiff brought an action for breach and failed. The Court thought that in these circumstances to compel the defendant to go on with the contract would be to hold him to something different from that to which he had agreed.

(ii) Incomplete performance of divisible contracts

The question of degree may appear in other forms. We have already seen that performance of a contract must be precise and exact, and that where, as in *Cutter v. Powell*,¹ one party's promise is made conditional on complete and entire performance by the other, the party in default cannot recover anything if he incompletely performs his side of the contract. But this rule, if rigorously applied, would be productive of great injustice. It would be hard to contend, for example, that even the most trivial defect in the quality of goods sold, or some momentary slip or inefficiency on the part of a servant, should entitle the 'injured' party to treat the contract as discharged. Moreover, it would often result in his unjust enrichment if he could take the benefit of the incomplete performance without the necessity of paying for it. Many contracts are, of course, by their very nature entire and indivisible. The tailor cannot deliver a half-made suit nor the artist a half-painted picture. But others admit of performance which is something less than complete, at any rate in so far as a trifling departure from the exact terms of the agreement will not deprive the guilty party of all remedy.

Doctrine of 'substantial performance'

In these cases, therefore, the law provides that if the contract is substantially performed, the injured party cannot treat himself as discharged, although he will have an action for any damages which he may have sustained by reason of the incomplete performance.² This is especially so in those cases where the breach can be remedied by the expenditure of money, and where the innocent party has derived some benefit from the work already done. In *Dakin (H.) & Co., Ltd. v. Lee*,³ Cozens-Hardy M.R. gave the following example:

Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms

¹ (1756), 6 Term Rep. 320; *supra*, p. 418.

² *Boone v. Eyre* (1779), 1 H. Bl. 273.

³ [1916] 1 K.B. 566, at p. 579; Cf. *Vigers v. Cook*, [1919] 2 K.B. 475, and *Bradley v. Horner* (1957), 10 D.L.R. (2d) 446 (Canada).

only two coats of paint are put on. Can anyone seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?

In that case:

The plaintiffs were builders who had contracted to execute certain repairs to the defendant's premises. They carried out a substantial part of the contract, but failed to perform it exactly in three unimportant respects. The official referee appointed by the parties held that the plaintiffs were consequently not entitled to recover any part of the contract price.

On appeal, it was held that this finding was erroneous. The contract had been substantially, if not precisely, performed. As Pickford L.J. pointed out, the fact that the work was done badly did not mean that it had not been performed at all. The plaintiff was accordingly entitled to recover the price less a reduction for the defective work.

Although a shipowner can have no action for the recovery of freight *pro rata itineris peracti* when the vessel has not completed the voyage, a term in a charter-party that a ship should arrive at a certain place on a certain day, or should use all due diligence to arrive as soon as possible, is one that admits of greater or less failure in performance, and according to the circumstances such failure may or may not discharge the contract.¹ Similarly in a charter-party containing a promise to load a *complete* cargo, the contract is not necessarily discharged because the cargo loaded is not complete.²

But perhaps the most important exception to general rule of the indivisibility of contractual obligations is that distinction which is made in a complex agreement between those terms known as conditions and those known as warranties.³ The failure of a condition, it will be remembered, entitles the injured party to treat the contract as discharged; but the failure to make good a warranty only gives rise to a claim for damages. Thus although performance of a contract must be precise and exact, the breach of a term which is merely subsidiary, and not vital, to the main purpose of the agreement will not amount to a repudiation.

¹ *Freeman v. Taylor* (1831), 8 Bing. 124.

² *Ritchie v. Atkinson* (1808), 10 East 295, *per* Lord Ellenborough C.J. at p. 308.

³ *Supra*, p. 109.

Question
to be
solved

The question to be answered in all these cases of incomplete performance is one of fact;¹ the answer must depend on the terms of the contract and the circumstances of each case.² The question assumes one of two forms—Does the failure of performance amount in effect to a renunciation on his part who makes default? Does it go so far to the root of the contract as to entitle the other to say, 'I have lost all that I cared to obtain under this contract; further performance cannot make good the prior default'?

Sometimes the answer to the question is provided by the parties themselves. The party who makes the default may so act as to leave no doubt that he will not or cannot carry out the contract according to its terms. Or again the parties may expressly agree that, though the promises on both sides are in their nature divisible, nothing shall be paid on one side until after entire performance has taken place on the other. In such case the Courts are relieved of the task of interpretation.

But if the parties have not provided an answer, we come back to the question of fact; was the breach so substantial as to go to the root of the contract? or, at any rate, was it such that an intention to repudiate the contract may be inferred from it? The rule was stated very clearly by Bigham J. in *Millar's Karri and Jarrah Co. v. Weddel, Turner & Co.*,³ a case of a contract to deliver by instalments:

If the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty.

And in a later case,⁴ the Court of Appeal, after reviewing the authorities, concluded that the main tests to be considered in

¹ *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401.

² *British and Beningtons, Ltd. v. North West Cachar Tea Co., Ltd.*, [1923] A.C. 48, per Lord Sumner at p. 71.

³ (1909), 100 L.T. 128, at p. 129.

⁴ *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 148, per Lord Hewart C.J. at p. 157.

such cases are, 'first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated'.

Acceptance of Partial Performance

Although the normal rule is that a party who incompletely performs his side of the obligation cannot recover in respect of any partial performance which he may have made, yet a claim to remuneration may arise where the other party has accepted such partial performance. In the case of the sale of goods, for example, section 30 (1) of the Sale of Goods Act¹ provides:

Injured party may accept partial performance

Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

In most cases, such a claim will arise upon a *quantum meruit*, that is to say, for a reasonable sum in respect of the benefit conferred by the partial performance. But it will only do so if the party not in default has the option whether to accept or to refuse the partial performance; it cannot be forced upon him against his will. Thus in *Sumpter v. Hedges*:²

The plaintiff agreed to erect certain buildings on the defendant's land. He failed to complete the contract. The defendant thereupon completed the building himself, using the materials left on the site by the plaintiff. The plaintiff brought an action to recover the value of the work done and also claimed in respect of the building materials used.

It was held that he could not recover for the work which he had done, for the defendant had no option but to accept the building partly erected on his land. But he was entitled to recover the value of the materials used, for the defendant could choose whether or not he would use these to complete the building.

The basis of this liability is that acceptance of partial performance implies a fresh agreement between the parties to pay for the work already done or goods supplied.

¹ 56 & 57 Vict., c. 71.

² [1898] 1 Q.B. 673; *Munro v. Butt* (1858), 8 E. & B. 738; *Bradley v. Horner* (1957), 10 D.L.R. (2d) 446 (Canada).

CHAPTER XV

IMPOSSIBILITY OF PERFORMANCE

Impossibility IMPOSSIBILITY of performance may appear on the face of the contract, or may exist unknown to the parties at the time of making the contract, or may arise after the contract is made. It is with this last sort of impossibility that we are here concerned.

Unreality of consideration Where there is obvious physical impossibility, or legal impossibility apparent on the face of the promise, there is no contract, because such a promise is no real consideration for any promise given in respect of it.¹

Mistake Impossibility which arises from the non-existence of the subject-matter at the time of the contract avoids it, when, as usually may be presumed, both parties have contracted on an assumption, which turns out to be false, that the subject-matter does exist. The contract then is void on the ground of mutual mistake.²

Subsequent impossibility Impossibility which arises subsequently to the formation of a contract may, in certain circumstances, discharge the parties from further performance of their obligations. The contract is then said to have been 'frustrated'. This term was once confined to the discharge of commercial contracts, but it has now been extended to cover all cases where an agreement has been terminated by supervening impossibility.³ Indeed the concept of frustration of a contract may be said to bear a more extensive meaning than that of impossibility, for it is not strictly necessary that performance should have become completely impossible, provided that it cannot properly be demanded in the fundamentally different situation which has unexpectedly occurred.⁴

Emergence of the Doctrine

Historical survey Before 1863 it was a general rule of the law of contract that a man was absolutely bound to perform any obligation which he had undertaken, and could not claim to be excused by the

¹ *Supra*, p. 90.

² *Supra*, p. 245.

³ *Infra*, p. 432.

⁴ "The explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may in some circumstances not discharge the contract at all. On the other hand, impossibility is too stiff a test in other cases, e.g. *Krell v. Henry*", per Viscount Simon in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154, at p. 164.

mere fact that performance had subsequently become impossible; for 'where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible'.¹ So in *Paradine v. Jane* in 1647:²

Paradine sued Jane for rent due upon a lease. Jane pleaded 'that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession . . . whereby he could not take the profits'. This plea was in substance a plea that the rent was not due because the lessee had been deprived, by events beyond his control, of the profits from which the rent should have come.

The Court held that this was no excuse:³

When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.

This passage has often been cited and, indeed, has been followed even in more recent times, for it is still true to say that, where a man specifically undertakes an absolute obligation, he will be bound to it notwithstanding that performance has become impossible.⁴

Modern illustrations of the rule are to be found in the promise of a lessee of real property to pay the rent due under the lease,⁵ or to undertake repairs,⁶ and in the promise of the charterer of a vessel to the shipowner that the cargo shall be unloaded within a certain number of days or payment made as 'demurrage'.⁷ In *Thiis v. Byers*,⁸ for example:

A cargo of timber was agreed to be made up into rafts by the master of the ship, and in that state removed by the charterer. This was to be completed within a certain time. Storms intervened to prevent the master from doing his part.

¹ *Taylor v. Caldwell* (1863), 3 B. & S. 826, *per* Blackburn J. at p. 833.

² (1647), Aleyn 26.

³ At p. 27.

⁴ *Hills v. Sughrue* (1846), 15 M. & W. 253; *Budgett & Co. v. Binnington & Co.* [1891] 1 Q.B. 35.

⁵ *Matthey v. Curling*, [1922] 2 A.C. 180.

⁶ *Redmond v. Dainton*, [1920] 2 K.B. 256.

⁷ *Viz. infra*, Appendix A, n. 3.

⁸ (1876), 1 Q.B.D. 244.

It was held that this necessary default on the part of the master did not relieve the charterer from his obligation to have the cargo unloaded within the time specified. So, too, a dock strike affecting the labour engaged by both shipowner and charterer does not release the latter. He makes 'an absolute contract to have the cargo unloaded within a specified time. In such a case the merchant takes the risk'.¹ It need hardly be said that the parties may, if they choose, provide expressly in their contract against such risks, and every charter-party today contains a formidable list of such exceptions, known as 'excepted risks'.²

unless
subject to
condition

But the rule that impossibility of performance does not excuse the promisor applies only where a promise is positive and absolute, not subject to any condition express or implied. We have already spoken of what are termed 'conditions subsequent',³ as well as of excepted risks, whereby the parties introduce an express provision into the contract that the fulfilment of a condition or the occurrence of an event may discharge one or both of them from further liabilities under it. But just as the parties may expressly make the obligation to perform a contract conditional upon its continued possibility, so there are cases in which a contract, though containing no such express provision, will be interpreted by the Courts as containing such a provision by implication. And where a promise is, either expressly or by implication, conditional and not absolute, then, if the condition on which the obligation to perform it depends is not fulfilled, the promisor will be excused.

Taylor v.
Caldwell

This was the device used by the Court of Queen's Bench in the case of *Taylor v. Caldwell* (1863)⁴ in order to introduce an exception into the existing law:

The defendant agreed with the plaintiff to hire to him a music-hall for the purpose of entertainment. Before the day of performance arrived, the music-hall was destroyed by fire. The plaintiff sued the defendant for damages for breach of the contract which the defendant, through no fault of his own, was unable to perform.

The defendant was held not liable to pay, for 'the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case,

¹ *Budget & Co. v. Binnington & Co.*, [1891] 1 Q.B. 35, *per* Lopes L.J. at p. 41.

² *Supra*, p. 111.

³ *Supra*, p. 111.

⁴ (1863), 3 B. & S. 826.

before breach, performance becomes impossible from the perishing of the thing without default of the contractor'.¹

The principle [said Blackburn J.]² seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

From this time onwards the Courts showed themselves prepared to hold that, unless a contrary intention appears, the continuance of a contract is conditional upon the possibility of its performance.

Instances of Impossibility

We may group under certain heads the cases in which the Courts have been ready to infer, from the nature of the contract and from the circumstances surrounding it, that it has been discharged by the happening of a subsequent event.

Instances of subsequent impossibility

The first and most simple case is probably that where the performance of the contract is made impossible by the destruction of the specific thing essential to that performance, for example, the destruction of the music-hall in *Taylor v. Caldwell*. So if factory premises in which machinery is being installed are destroyed by fire,³ or a crop of potatoes to be grown on a particular field largely fails,⁴ or a ship under charter-party is seized by a foreign government,⁵ the contract is discharged.

(i) destruction of subject-matter of contract

But it is not necessary that the destruction of the thing should be absolute; it is enough if it ceases to exist for the purpose contemplated by the contract. In *Nickoll v. Ashion, Edridge & Co.*,⁶ a cargo sold by the defendants to the plaintiffs was to be shipped by a specified ship; without default on the defendant's part the ship was so damaged by stranding as to be unable to load within the time agreed, and the Court held that in these circumstances the contract must be treated as at an end.

¹ At p. 833.

² At p. 839.

³ *Appleby v. Myers* (1867), L.R. 2 C.P. 651; *infra*, p. 447.

⁴ *Howell v. Coupland* (1876), 1 Q.B.D. 258; *infra*, p. 451.

⁵ *Tatem, Ltd. v. Gamboa*, [1939] 1 K.B. 132; *infra*, p. 440.

⁶ [1901] 2 K.B. 126.

(ii) non-existence or non-occurrence of a particular state of things Secondly, the principle of impossibility has been held not to be limited to contracts *de certo corpore* where the existence or continued existence of some specific thing is involved. In the so-called 'Coronation cases', which arose out of the postponement of the coronation of King Edward VII owing to his sudden illness, it was extended to contracts the performance of which was held to have become impossible by the non-existence or non-occurrence of a particular state of things forming the basis on which the contract had been made. In *Krell v. Henry*,¹ for instance:

The defendant agreed to hire a flat from the plaintiff for June 26 and 27, 1902; the contract contained no reference to the coronation processions, but they were to take place on those days and to pass the flat. The processions were cancelled.

The rent had not become payable when the processions were abandoned and the Court of Appeal held that the plaintiff could not recover it. The Court regarded the subject-matter of the contract as 'rooms to view the procession', and the cancellation had made them not 'rooms to view the procession'. The contract was discharged.

I do not think [said Vaughan Williams L.J.]² that the principle . . . is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things.

It should not be imagined, however, that failure before performance of the factor which induced the parties to enter into the agreement will necessarily discharge the contract; for 'it may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but

¹ [1903] 2 K.B. 740. It has been argued that the issue raised by this case was not one of impossibility of performance, but of failure of consideration, the plaintiff suing, not to enforce the contract, but to recover the money paid. But cf. *Horlock v. Beal*, [1916] A.C. 486, per Lord Shaw at p. 513; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154, per Lord Porter at p. 198.

² At p. 749.

that the actual happening of the event was not made the basis of the contract'.¹ In *Herne Bay Steamboat Co. v. Hutton*:²

The defendant chartered from the plaintiff a ship for the purpose of taking passengers to see the Coronation naval review at Spithead and to tour the fleet. The review was cancelled.

The Court of Appeal refused to hold the defendant discharged. It was the defendant's own venture and it was at his risk. The Court pointed out that if the existence of a particular state of things is merely the motive or inducement to one party to enter into the contract, as distinct from the basis on which both contract, the principle cannot be applied.

Thirdly, where performance of a contract for personal services is rendered impossible by the death or incapacitating illness of the promisor, a term will readily be implied that performance is conditional on the promisor's continued capacity to perform the contract. In *Stubbs v. Holywell Railway Co.*³ it was held that a contract for personal services was put an end to by the death of the party by whom the services were to be rendered. 'The man's life', said Martin B., 'was an implied condition of the contract.' And in *Robinson v. Davison*:⁴

(iii) death, or incapacity for personal service

The defendant's wife, an eminent pianoforte player, promised to perform at a concert, but was prevented from doing so by a dangerous illness. An action was brought against the defendant claiming damages for breach of contract.

Judgment was given for the defendant on the ground that the continued good health of his wife was a condition annexed to the agreement. The contract being discharged, it was not broken by her failure to perform, nor, on the other hand, could she have insisted on performing when she was unfit to do so. Similar decisions have been reached in the case of the discharge of a seaman's contract of service by his internment,⁵ and of that of a music-hall artist by his call-up for service in the army.⁶

Fourthly we come to those cases concerning commercial contracts and the 'frustration of the adventure'.⁷ These are by far the most frequent and most important instances of the

(iv) frustration of the adventure

¹ *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla* (1923), 92 L.J.K.B. 455, per Lord Finlay at p. 459 (speculative contract).

² [1903] 2 K.B. 683.

³ (1867), L.R. 2 Ex. 311.

⁴ (1871), L.R. 6 Ex. 269.

⁵ *Horlock v. Beal*, [1916] 1 A.C. 486.

⁶ *Morgan v. Manser*, [1948] 1 K.B. 184.

⁷ See McElroy and Glanville Williams, *Impossibility of Performance* (1941), p. 121; McNair, *The Legal Effects of War* (1944), p. 133, together with articles by the same author (1919), 35 L.Q.R. 84 and (1940), 56 L.Q.R. 173.

application of the doctrine. Here the question to which the Courts address themselves is whether supervening events have frustrated the object of both parties by so changing the circumstances in which a promise fails to be performed that to hold the promisor to it would be to hold him to something which, though it may not be impossible, is something different from that which he originally promised to do. Most of the early frustration cases arose out of delay, attributable to the fault of neither party, in the carrying out of charter-parties and they seem at first to have been treated as raising a question which was regarded as connected, rather than identical, with that raised by the cases of impossibility.

In *Jackson v. Union Marine Insurance Co., Ltd.*:¹

The plaintiffs' ship had been chartered to proceed in January to Newport and there load a cargo of iron rails for San Francisco. On the way to Newport she ran aground and was not got off until over a month had elapsed. She was taken into Liverpool and underwent lengthy repairs lasting until August. In the meantime the charterers had chartered another ship. The plaintiffs claimed from the defendant insurance company for a total loss, by perils of the sea, of the freight to be earned under the charter-party.

The question whether or not there had been such a loss depended for its answer on the question whether or not the charterers had been justified in throwing up their contract with the plaintiffs instead of waiting until the ship was repaired and then loading her. The jury found that the time necessary to get the ship off, and to repair her so that she might become a cargo-carrying ship, had been so long as to put an end in a commercial sense to the speculation entered into by the plaintiffs and the charterers; and on this finding the Court held that a voyage undertaken after the ship had been repaired would have been an adventure different from that which both parties had contemplated at the time of the contract. It was, they said, an implied term of the contract that the ship should arrive at Newport within a reasonable time, and her being unable to arrive put an end to it. 'The adventure', said Bramwell B.,² 'was frustrated by perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement.'

Principles the same as in case of impossibility The dislocation of business caused by the war with Germany from 1914 to 1918 brought a large number of frustration cases into the Courts, and it soon became clear that they raised the

¹ (1874), L.R. 10 C.P. 125.

² At p. 148.

same questions as those raised by cases previously considered under the head of impossibility. 'When this question arises in regard to commercial contracts', said Lord Loreburn,¹ 'the principle is the same, and the language as to "frustration of the adventure" merely adapts it to the class of cases in hand.' 'The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made.'² The modern practice is to use the term 'frustration' to cover cases of both classes.

In war-time, ships are often requisitioned for such time and for such purposes as the Government may require them. If the ship is under charter-party the question will arise whether or not the requisitioning operates so as to frustrate the rights of the shipowners and charterers under the agreement. In *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*³ Requisitioning of ships

The steamship *F. A. Tamplin* was chartered by a time charter-party for five years from December 4, 1912, to December 4, 1917. In February 1915 the Government requisitioned the ship for use as a troopship and made certain structural alterations to her for this purpose. The charterers were willing to go on paying the agreed freight under the charter-party, but the owners claimed that the contract had been frustrated by the requisition as they wished to obtain a higher rate of freight.

The House of Lords, by a bare majority, held that the contract still continued. Lord Loreburn considered that the interruption was not of sufficient duration to make it unreasonable for the parties to go on. There might be many months during which the ship would be available for commercial purposes before the five years expired. Lord Parker (with whom Lord Buckmaster agreed) was of the opinion that, since it was merely a time charter-party, there was no specific commercial adventure capable of being frustrated.

In *Bank Line, Ltd. v. Capel (A.) & Co.*,⁴ on the other hand:

In February 1915, the defendants agreed to charter to the plaintiffs the steamship *Quito* for a period of twelve months from the time the vessel should be delivered and placed at the disposal of the plaintiffs. It was provided in the charter-party that (i) if the steamer had not been delivered by April 30, 1915, the charterers were to have the option to cancel the

¹ *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397, at p. 404.

² *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154, per Viscount Maugham at p. 168.

³ [1916] 2 A.C. 397.

⁴ [1919] A.C. 435.

contract or to proceed with it, and (ii) 'Charterers to have option of cancelling this charterparty should steamer be commandeered by Government during this charter'. The steamer was not delivered by April 30, and, on May 11, before delivery, she was commandeered by the Government and not released until September. She was then sold by the defendants, and the plaintiffs sued for non-delivery, having never exercised their options.

The House of Lords held that the contract had been frustrated. The clauses in the charter-party were not intended to place the ship-owners indefinitely at the charterers' mercy, to oblige them to deliver however long the delay. They merely gave to the charterers the option to cancel the contract without the necessity of proving frustration.

A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it. A contingency may be provided for, but in such a way as shows that it is provided for only for the purpose of dealing with one of its effects and not with all.¹

Lord Haldane, who dissented, was of the opinion that there was no frustration; the requisition was not of such a permanent character as to make the terms of the charter-party wholly inapplicable.

Delay These differences of opinion within the highest tribunal show that cases of frustration raise most difficult questions of fact and principle. In particular, where the execution of the contract is delayed by the happening of an external event, the tests to be applied have been stated in divers terms.

Delay [said Lord Sumner²] even of considerable length and of wholly uncertain duration is an incident of maritime adventure, which is clearly within the contemplation of the parties . . . so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure, for the ship's expenses and overhead charges are running on. . . . None the less this is not frustration.

The delay must be such as 'to render the adventure absolutely nugatory',³ 'to make it unreasonable to require the parties to go on',⁴ 'to destroy the identity of the work or service when

¹ [1919] A.C. 435, *per* Lord Sumner at p. 456.

² *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435, at p. 456.

³ *Bensaude & Co. v. Thames and Mersey Marine Insurance Co.*, [1897] 1 Q.B. 29, *per* Lord Esher M.R. at p. 31; [1897] A.C. 609, at pp. 611, 612, 614.

⁴ *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1918] A.C. 119, *per* Lord Atkinson at p. 131, *F.A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397, *per* Lord Loreburn at pp. 404, 405.

resumed with the work or service when interrupted',¹ 'to put an end in a commercial sense to the undertaking'.² The use of such phrases clearly indicates that delay by itself is insufficient. In *Davis Contractors, Ltd. v. Fareham U.D.C.*:³

In July 1946, the plaintiffs entered into a contract with the defendants to build 78 houses for a fixed sum of £94,424. Owing to an unexpected shortage of skilled labour and of certain materials the contract took twenty-two months to complete instead of the eight months expected, and cost some £115,000. The plaintiffs contended that the contract had been frustrated and that they were entitled to claim on a *quantum meruit* for the cost actually incurred.

The House of Lords refused to accept this contention. The mere fact that unforeseen circumstances had delayed the performance of the contract, and rendered it more onerous to the plaintiffs, did not discharge the agreement. The ultimate situation was still within the scope of the contract; the thing undertaken was not, when performed, different from that contracted for.

These strict requirements were, however, fulfilled in the case of *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*:⁴

Messrs. Dick, Kerr & Co. contracted with the Metropolitan Water Board to construct a reservoir within six years. Two years elapsed when the Minister of Munitions, acting under statutory powers, required them to cease work on their contract and to remove and sell their plant. The Board brought an action claiming that the contract still continued.

The House of Lords held that the interruption created by the prohibition was of such a character and duration as to make the contract, if resumed, in effect a different contract, and that the original contract was therefore discharged.

Finally, we come to discharge by supervening illegality. The performance of a contract is sometimes made legally impossible by a change in the law. The law may actually forbid the doing of some act undertaken in the contract, or it may take from the control of the promisor something in respect of which he has contracted to act or not to act in a certain way. Or per-

¹ *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1918] A.C. 119, per Lord Dunedin at p. 128; *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435, per Lord Sumner at p. 460.

² *Jackson v. Union Marine Insurance Co., Ltd.* (1874), L.R. 10. C.P. 125.

³ [1956] A.C. 696. See also *Dryden Construction Co., Ltd. v. Hydro Electric Power Commission of Ontario* (1957), 10 D.L.R. (2d) 124 (Canada).

⁴ [1918] A.C. 119.

formance may become illegal by a change in the operation of the law by reason of new facts, such as the outbreak of war, supervening. Such cases have sometimes been said not to be cases of frustration,¹ for the contract is discharged *ipso facto* without any reference to the question whether or not the parties intended it to continue. There is no need to imply a term in the original contract, for a sufficient explanation is 'the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged'.² Yet the consequences of such impossibility are identical with those of commercial frustration, and there seems no valid reason why it should not be treated in exactly the same way.

The illegality must be such as to strike at the root of the agreement, and not merely to suspend or hinder its operation in part. So it has been held that a ninety-nine year building lease was not frustrated by Government restrictions on building for only a small part of the term,³ and that the rights of a payee of a cheque drawn on a bank in Holland were not discharged by an enemy invasion and occupation of that country rendering payment there illegal, but not elsewhere.⁴

Effect of
war

The outbreak of war is another event which, by changing the operation of the law, may have the effect of abrogating obligations outstanding under a contract by reason of supervening illegality, if one of the parties resides in this country and the other in enemy or enemy-occupied territory.⁵ Also the Courts will not, for reasons of public policy and international comity, enforce a contract in this country which is to be performed abroad and which becomes impossible of performance because a change in the foreign law has made it illegal. 'This country', said Scrutton L.J.,⁶ 'should not assist or sanction the breach of the laws of other independent states.'

¹ Anson (20th ed.), p. 354; *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180.

² *Reilly v. The King* [1934] A.C. 176, per Lord Atkin at p. 180; *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678, at p. 698.

³ *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] A.C. 221; *infra*, p. 445.

⁴ *Cornelius v. Banque Franco-Serbe*, [1942] 1 K.B. 29; *Arab Bank, Ltd. v. Barclays Bank*, [1954] A.C. 495.

⁵ *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32.

⁶ *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, at p. 304; *Regazzoni v. Sethia* (1944), *Ltd.*, [1958] A.C. 301.

Juridical Basis of the Doctrine

Various theories have been put forward from time to time as to the true basis of the doctrine of discharge by impossibility. A great deal has been written on this subject, and successive pronouncements of the House of Lords contain a number of learned, but often contrary, opinions concerning the principles on which the doctrine rests. It is proposed here to consider the more conspicuous of these.

Nature of
doctrine of
discharge
by impossi-
bility

(a) The implied term

The following passage from the judgment of Lord Loreburn in *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*¹ is generally considered to be the classic exposition of the reasons on which the doctrine of the implied term is based:

Implied
term

A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. . . . Sometimes it is put that performance has become impossible, and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted. . . . Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course it is all over between us'?

This passage has often been cited in later cases, but there is some authority for another view of the nature of the implied term which discharges the contract in these cases. In itself that phrase is ambiguous. It may be used in a subjective sense, that is to say, it may mean a term which, although the parties have not expressed it, the Court reads into their contract, not in order to modify their agreement, but in order to give effect to what it regards as their real intention at the time of contracting.

may be
subjective

¹ [1916] 2 A.C. 397, at p. 403.

This is perhaps the sense in which Lord Loreburn was using it. But it may also be construed more objectively. It may mean a term which, in the light of the circumstances which have actually occurred, the parties *as reasonable men* would have imported into the contract. In the words of Lord Watson in *Dahl v. Nelson, Donkin & Co.*:¹

The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

In the first case the term is a genuine term, implied though not expressed; in the second it is a fiction, something added to the contract by the law.

Difficulties
of implied
term when
used in
subjective
sense

The implied term theory has been accepted by a preponderance of judicial opinion as a correct statement of the law; but it must be admitted that it is very unsatisfactory. If used in a subjective sense it is difficult to see how the parties can be taken, even impliedly, to have provided for something which *ex hypothesi* they neither expected nor foresaw.² Moreover, had the possibility of the frustrating event actually occurred to them, it is unlikely that they would have simply agreed that the contract was to come to an end:

It is not possible, to my mind [said Lord Wright³], to say that if they had thought of it they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.

Frustration is 'irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances'.⁴

¹ (1881), 6 App. Cas. 38, at p. 59.

² *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] A.C. 696, *per* Lord Radcliffe at p. 728. Also see the example cited by Lord Sands in *James Scott & Sons, Ltd. v. Del Sel*, [1922] S.C. 592, at p. 597: 'A tiger has escaped from a travelling menagerie. The milk girl fails to deliver the milk. Possibly, the milkman may be exonerated from any breach of contract, but, even so, it would seem hardly reasonable to base that exoneration on the ground that "tiger days excepted" must be held as if written into the milk contract.'

³ *Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] A.C. 265, at p. 275.

⁴ *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A.C. 497, *per* Lord Sumner at p. 510.

The discharge of the contract occurs not by act of the parties, but by operation of law. On the other hand, if used in an objective sense, the implied term is betrayed by a similar artificiality. The fair and reasonable man has no real existence; his opinion is, in fact, that of the Court. Even though the occurrence of the frustrating event may have been contemplated by the parties, as in the *Bank Line Case*,¹ the Court will hold them discharged. His appearance only serves to mask the true action of the Court when it implies a term. 'It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.'²

and in
objective
sense

Historically the implied term theory has played a useful and necessary part in the development of the law. It is also in line with the tendency of English jurisprudence to hold that it is for the parties, and not for the Courts, to make or break the contracts into which they have entered. But its extraordinary persistence is due, for the most part, to the fact that it emphasizes most clearly that it is not possible to allege frustration where the contract provides expressly and in precise terms for the event which has actually occurred. The implied term cannot be set up in opposition to the express terms:

Where the contract [said Lord Sumner³] makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the Court to import into the contract some other and different provision for the same contingency called by a different name.

But, as we shall see, this principle is adequately safeguarded by any theory which requires the Court, as a matter of course, first to construe the contract according to the normal canons of interpretation, without the necessity of resorting to any artificial speculation concerning the parties' actual or presumed intentions.

(b) *Disappearance of the foundation of the contract*

Recognition of the positive function of the Courts in relation to the doctrine of frustration led to a more realistic formulation in terms of the disappearance of the foundation which the

Disappearance of
basis of
contract

¹ [1919] A.C. 435; *supra*, p. 433.

² *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A.C. 497, *per* Lord Sumner at p. 510.

³ *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435, *per* Lord Sumner at p. 455, citing *Bailhache J. in Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1916] 1 K.B. 429, at p. 438 (reversed [1917] 1 K.B. 222).

parties assumed to be at the basis of their contract. This is quite independent of any implied term:

There are many positive rules of law imposed upon contracting parties which govern the whole creation, performance, and dissolution of a contract which are quite independent of the intention of the parties. For my part I see no reason why, in a certain set of circumstances which the Court finds must have been contemplated by both parties as being of the essence of the contract and the continuance of which must have been deemed to have been essential to the performance of the contract, the Court should not say that when that set of circumstances ceases to exist, then the contract ceases to operate.¹

It was adopted by Goddard J. in *Tatem, Ltd. v. Gamboa*:²

During the Spanish civil war, the plaintiffs chartered to the defendant, acting on behalf of the Republican Government of Spain, a steamship, for 30 days from July 1, 1937. The ship was to be used for the evacuation of the civilian population from Northern Spain to French ports, and the hire was to be at the rate of £250 per day. On July 14, the ship was seized by the Nationalists and detained in the port of Bilbao until September 11. In answer to the plaintiffs' claim for hire, the defendant pleaded that the contract had been frustrated.

The high rate of hire clearly showed that possibility of seizure of the vessel was contemplated by the parties at the time they made the contract. Nevertheless it was held that this action had discharged the contract. Goddard J. said:³

If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated.

This theory has sometimes been thought to be analogous to that of pre-contractual mistake—mistake arising out of a false and fundamental assumption,⁴ but these are different juristic concepts and the same considerations do not apply in both cases.⁵

¹ *Russkoe v. Stirk* (1922), 10 Ll. L.R. 214, per Atkin L.J. at p. 217.

² [1939] 1 K.B. 132.

³ At p. 139.

⁴ *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435, per Lord Haldane at p. 445; *Bell v. Lever Bros.*, [1932] A.C. 161, per Lord Atkin at p. 226.

⁵ *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154, per Lord Wright at p. 186; *Bell v. Lever Bros.*, [1932] A.C. 161, per Lord Thankerton at p. 237.

(c) *The just and reasonable solution*

A still more radical theory is that the Court exercises a qualifying power—a power to qualify the absolutely binding nature of the contract—in order to do what is just and reasonable in the new situation. There can be little doubt that this is the true explanation of the function of the Court in cases of discharge by frustration. If a term is implied, it is implied because it is just and reasonable to do so. If the parties are not held to their bargain when the foundation of the agreement has disappeared, it is because it is just and reasonable to release them. But this theory is not without its dangers. It suggests that the Court has an inherent jurisdiction to go behind the literal words of the contract and to make such changes as it considers desirable in the circumstances. Indeed, in *British Movietone News, Ltd. v. London and District Cinemas, Ltd.*, Denning L.J. said:¹

Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers. We realize that they have their limitations and make allowances accordingly.

This view was promptly repudiated on appeal by the House of Lords.² Their lordships reiterated the statement of Lord Loreburn that 'No court has an absolving power'. Viscount Simon pointed out that it is not possible to release parties from their contractual obligations merely because it is just and reasonable to do so, for this might well be the case when the only effect of the subsequent event had been to render the contract financially more onerous than the parties had anticipated. A situation must arise to which it can be said that the contract no longer applies.

In view of these pronouncements by the highest tribunal, it cannot be contended that this theory is legally tenable as a basis for the doctrine of discharge by frustration. It would be wrong in law for a judge to direct himself, without more, that his only consideration was what was a just and reasonable solution in the circumstances.

¹ [1951] 1 K.B. 190, at p. 202; viz. *supra*, p. 138.

² [1952] A.C. 166; *supra*, p. 138.

(d) Change in the obligation

'Change in
the obligation'

Perhaps the most acceptable of the conservative theories, and the one which has received the warmest commendation, is that which we may call the 'change in the obligation' theory. In *Davis Contractors, Ltd. v. Fareham U.D.C.*, Lord Radcliffe said:¹

Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

The first duty of the Court is to construe the contract. If the terms of the contract when so construed, and in the light of the circumstances existing at the time it was made, show that it cannot be held to apply to the changed situation which has unexpectedly occurred, the contract is discharged. 'It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.'²

Is deter-
mination
of basis of
doctrine
practically
useful?

Having reflected upon the various theories put forward as to the juridical basis of the doctrine of frustration, the reader may well ask what difference the adoption of one or other of these theories will make to any particular case under consideration. The answer would seem to be 'very little'. Most judges have deemed it imperative to discover the true basis of the doctrine before arriving at their decision, but they nevertheless seem to reach the same conclusion in the end.³ There may be some differences between the theories as to whether frustration is a question of fact or law, and as to the admissibility of ex-

¹ [1956] A.C. 696, at p. 729; and see Lord Reid at p. 721; *British Movietone News, Ltd. v. London and District Cinemas, Ltd.*, [1952] A.C. 166, per Viscount Simon at p. 185.

² *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] A.C. 696, per Lord Radcliffe at p. 729.

³ 'It would appear to be the fate of frustration cases when they reach the highest tribunals that either there should be agreement as to the principle but differences as to its application, or differences as to the principle but agreement as to its application' per Diplock J. in *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 2 Q.B. 146, at p. 162.

trinsic evidence,¹ but the main dispute would seem to be that of a conservative or radical approach to the problem. Given judges of a similar judicial outlook and disposition, there would seem to be no reason to believe that they would arrive at dissimilar conclusions as the result of the adoption of different theories. One of the firmest protagonists of the implied term theory was Viscount Simon; one of its most devoted opponents was Lord Wright. But there is little evidence that these Lords of Appeal were in any way divided as to the conclusion to be reached, even though each might arrive there by a different path. Both were anxious to maintain the principle of the binding force of contracts deliberately made.

Limitations on the Doctrine

We may note here some of the limits which have been placed upon the doctrine of discharge by impossibility of performance. Limitations

In the first place, it is well established that the doctrine cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party: 'Reliance cannot be placed upon a self-induced frustration.' In *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*:² (i) self-induced frustration

The respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated.

The Judicial Committee of the Privy Council held that the failure of the contract was the result of the appellants' own election, and that there was therefore no frustration.

The rule, however, is not altogether clear when such an act was not intentional, but merely negligent. Although there have been frequent statements to the effect that the frustrating event must occur without the default of either party, this point has never been expressly decided. It was discussed by Negligent acts

¹ *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] A.C. 696, per Lord Reid at p. 721.

² [1935] A.C. 524. *Viz. supra*, p. 416.

the House of Lords in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, where Lord Russell, commenting on the kind or degree of fault which might debar a party from relying on a self-induced frustration, said:¹

The possible varieties are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the prima donna who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of *corpus* for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase.

In that case:

The appellants chartered to the respondents their steamship *Kingswood* to proceed to Australia and load a cargo there. Before this could be done, a violent explosion occurred in the boiler of the ship which resulted in such a delay as would discharge the contract. The cause of the explosion was never ascertained, but the respondents alleged that the appellants had first to establish that it occurred without their fault before they could rely on the doctrine of frustration and so not be liable for breach of contract.

It was not necessary for the House of Lords to decide whether mere negligence would be sufficient, for it held that the burden of proving that the event which causes the frustration is due to the act or default of a party lies on the party alleging it to be so. Since the respondents failed to satisfy the Court on this point, the contract was discharged.

(ii) event must defeat the common intention of the parties. Secondly, whatever may be the juridical basis of the doctrine, it is necessary that the frustrating event should defeat the common intention of the parties; there cannot be frustration on one side alone. In *Blackburn Bobbin Co., Ltd. v. Allen (T. W.) & Sons, Ltd.*:²

The defendant agreed to sell and deliver to the plaintiff at Hull a quantity of Finnish birch timber. He found it impossible to fulfil this contract because the outbreak of war cut off his source of supply from Finland. The buyer was unaware that timber from Finland was normally shipped direct from a Finnish port to Hull, and that timber merchants did not, in practice, hold stocks of it in this country.

The Court of Appeal held that there was no frustration. What had happened was merely that an unforeseen event had

¹ [1942] A.C. 154, at p. 179.

² [1918] 2 K.B. 467. It was also said in this case that there could never be frustration of a contract for the sale of non-ascertained goods; but this is probably too wide; see *Re Badische Co.*, [1921] 2 Ch. 331.

occurred which rendered it practically impossible for the defendant to deliver, but that that event might have been, but was not, provided for in the contract. For the contract to be dissolved there must have been a failure of something which was at the basis of the contract in the intention of *both* parties, and that was not the case here.

Thirdly, there is some doubt as to whether the doctrine of (iii) ^{does} frustration applies to leases of land. This question has not yet ^{doctrine} been finally decided. In *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*:¹ ^{apply to} ^{leases?}

In 1936, lessees obtained a building lease for 99 years for the erection of shops. By reason of restrictions imposed on the supply of building materials under the Defence of the Realm regulations, they were unable to carry out any building on the land as covenanted in the lease. In an action by the lessors for the rent they pleaded that the lease had been frustrated and that their liability for the rent had therefore ceased.

As the lease had still more than ninety years to run, and as it was reasonable to assume that the interruption would cover only a small part of that period, the House of Lords had no hesitation in holding that, on the facts of the case, there had been no frustration. But on the question whether a lease can in any circumstances be terminated by frustration the House was evenly divided. Both the trial judge and the Court of Appeal² had expressed the opinion that the doctrine could not be applied to a demise of real property and this had been the general tenor of previous authorities.³

In the House of Lords, however, Viscount Simon and Lord Wright thought that, though the occasions on which the doctrine could so apply must be very rare, yet it was possible to imagine circumstances in which it might do so. As illustrations they mentioned some vast convulsion of nature which might sweep the property into the sea, or the frustration of a building lease by a perpetual statutory prohibition on building for the remainder of the term. On the other hand, Lord Russell and Lord Goddard C.J. took the contrary view. A lease is more than a contract; it vests an estate in the land in the lessee, and the contractual obligations which it contains are merely incidental to the relationship of landlord and tenant. If all or some of these should become impossible, the lease would still remain,

¹ [1945] A.C. 221.

² [1943] K.B. 493.

³ *London & Northern Estates Co. v. Schlesinger*, [1916] 1 K.B. 20; *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K.B. 680; *Matthey v. Curling*, [1922] 2 A.C. 180, at p. 228.

and the estate in the land would still be vested in the tenant. Lord Goddard also pointed out that some curious consequences might ensue if it were held that a lease could be frustrated. The landlord might find himself entitled to resume possession of the land, with some buildings already erected thereon, for nothing. And what of the position of sub-tenants and mortgagees? Lord Porter, the fifth member of the House, refused to express an opinion.

In this state of the authorities¹ the decision of the Court of Appeal that the doctrine cannot be applied to a lease must be taken to represent the law. There would seem no strong reason, however, for holding that a lease of land, any more than a contract for the hire of chattels, should be placed in a separate and inflexible category.

Effects of Frustration

Effects of
frustration

It remains to consider the position of the parties when the performance of the contract has been frustrated.

(i) contract
determined
automatic-
ally

In the first place, the contract is not merely voidable at the option of one or other of the parties; it is brought to an end forthwith and automatically. In *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.*, Lord Sumner said:²

Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract.

In that case:

By a charter-party made in November, 1916, shipowners agreed that their ship, the *Singaporean*, should be placed at the charterers' disposal on March 1, 1917, for ten months. Shortly before this date the ship was

¹ See also *Denman v. Brise*, [1949] 1 K.B. 22 (C.A.); *Cusack-Smith v. London Corporation*, [1956] 1 W.L.R. 1368.

² [1926] A.C. 497, at p. 509.

requisitioned by the Government. The shipowners thought that she would soon be released, and asked the charterers if they would be willing to take up the charter. The charterers said that they would. The vessel was, however, not released until February, 1919, and the charterers refused to accept her.

It was contended by the shipowners that the charterers had so conducted themselves as to oust the doctrine of frustration. But the House of Lords held that frustration brings the contract to an end automatically, and could not be waived in this manner.

Secondly, the effect of frustration *at common law* is to release both parties from any further performance of the contract, while leaving intact any legal rights already accrued, or money already paid, before the frustrating event occurred. All obligations falling due for performance after that time are discharged; all those already due remain undisturbed. In *Appleby v. Myers*,¹ for example:

(ii) future obligations discharged

The plaintiffs undertook to erect certain machinery upon the defendant's premises, the agreement providing that the work was to be paid for on completion. While the work was in progress, and before it was completed, the premises and the machinery already erected were wholly destroyed by fire.

The contract was frustrated, but since it had been agreed that payment was to be made only on completion, the plaintiffs could recover nothing for the work already done. Also in *Chandler v. Webster*:²

but accrued obligations remain

The plaintiff agreed to hire from the defendant a room in Pall Mall to watch the Coronation procession. The price for the hire was to be £141, payable immediately. The plaintiff paid £100 of this sum, but before he paid the balance, the procession was cancelled. He claimed to recover back the money paid.

It was held not only that he could not recover the £100 already paid, but that he was also liable to pay the other £41 as this obligation had fallen due before the frustrating event occurred. The Court of Appeal rejected the plaintiff's argument that he was entitled to recover the £100 in quasi-contract as money paid under a consideration which had totally failed. The contract was not void from the beginning, but only discharged from the moment of frustration, so it could not be said that the 'consideration' had failed completely.

The harshness of the decision in *Chandler v. Webster* excited *Fibrosa case*

¹ (1867), L.R. 2 C.P. 651.

² [1904] 1 K.B. 493.

considerable criticism,¹ and in 1942 it was overruled by the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*:²

The respondents contracted to manufacture and to deliver to the appellants, a Polish company, at Gdynia certain machinery. Part of the price was to be paid in advance, and the appellants accordingly paid £1,000. The contract was frustrated by the outbreak of war in September, 1939. The appellants thereupon requested the return of the £1,000 which they had paid. This request was refused on the ground that considerable work had been done, and expense incurred, under the contract.

Under the rule in *Chandler v. Webster* this money would have been irrecoverable, as it had already been paid at the time the frustrating event occurred. The House of Lords, however, allowed the appellants to recover. It was pointed out that an action for the recovery of the sum paid was not an action on the contract, which *ex hypothesi* had ceased to exist, but an action in quasi-contract to recover money paid on a consideration which had wholly failed.³ The term 'consideration' should here be understood not in the sense of the consideration which is necessary to the formation of a contract, but rather in the sense of the performance of an obligation already incurred. If the party paying the money has received no part of the performance for which he bargained, he is entitled to recover it, for the consideration has totally failed.

Unsatisfactory position at common law
But the law as this decision left it was still not satisfactory, for the party who had to return the prepayment might have incurred expenses, or he might be left with goods on his hands which were made valueless by the failure of the contract. Moreover, if the party seeking recovery of the money had received any part, however small, of the performance of the contract, there could be no total failure of consideration,⁴ and the rule in the *Fibrosa Case* did not apply. It was to remedy this situation that the Law Reform (Frustrated Contracts) Act, 1943, was passed.

The Law Reform (Frustrated Contracts) Act, 1943⁵

Act of 1943
The Act provides that where a contract governed by English law has become impossible of performance or been otherwise frustrated, the following provisions are to apply:

¹ *Cantiare San Rocco v. Clyde Shipbuilding & Engineering Co.*, [1924] A.C. 226, at p. 257.

² [1943] A.C. 32.

³ *Viz. infra*, p. 552.

⁴ *Viz. infra*, p. 552.

⁵ 6 & 7 Geo. VI, c. 40. For a full commentary on this Act, see Glanville Williams's *Law Reform (Frustrated Contracts) Act, 1943*.

S. 1 (2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

A careful reading of this sub-section reveals that it has two effects.

In the first place, it embodies the rule in the *Fibrosa Case*, although it is now no longer necessary to prove a total failure of consideration. So if *A* agrees to manufacture and deliver to *B* certain machinery, *B* promising to pay £1,000 down and the balance on completion, then whether the £1,000 has been paid or is still owing at the time the frustrating event occurs, *B* can recover it, if paid, and, if not paid, it ceases to be payable.

Secondly, the Act goes further than the *Fibrosa Case* in that it gives to the Court a discretionary power to allow the payee to set-off against the sum so paid or payable the value of any expenses which he has incurred in performing the contract before the frustration. So if, in the above example, *A* has incurred expenses totalling, say, £600, then he may be permitted to recover or retain this sum from the £1,000 due to him at common law under the contract.¹

The next sub-section also provides for the adjustment of the financial relations of the parties:

S. 1 (3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing section applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case.

¹ If, however, the expenses amounted to, say, £1,200, it would not be possible to charge the £200 in excess of £1,000 against the unpaid balance due after the frustrating event occurred. Expenses can only be set-off against 'the sums so paid or payable', i.e. those due before the frustration.

In particular, the Court is to take into account the expenses incurred, and any adjustment made under the previous subsection, and also the effect, in relation to the benefit, of the circumstances giving rise to the frustration.

The result is that either party can recover compensation for any valuable benefit conferred upon the other party under the contract. If, for example, in the illustration set out above, *A* has already delivered to *B* some of the machinery and thereby conferred a valuable benefit upon him, the Court may allow *A* to recover the amount of this benefit from *B*. It will not permit *B* to be unjustly enriched at the expense of *A*. It has been pointed out, however, that this would not seem to provide for cases like *Appleby v. Myers*¹ where the work is totally destroyed and no valuable benefit remains to the other party. The suggestion has therefore been made that the words 'valuable benefit' should be interpreted so as to include any performance received by the other, whether or not he derives any sensible advantage from it.² Such an interpretation has little to commend it. The question is really one of who shall bear the risk of frustration, and there seems to be no good reason why the 'purchaser' should have to do so rather than the 'vendor'.³ Further, the sub-section creates a well-known head of quasi-contractual liability: that one who is actually and unjustly enriched at the expense of another should be forced to compensate him to whose detriment this occurred.⁴ But it does not embrace 'constructive enrichment' where no real benefit is received.

- Exceptions The Act does not apply if there is an agreement to the contrary in the contract; and certain types of contract are expressly exempted from its operation. The first is a contract for the carriage of goods by sea and voyage charters (i) carriage of goods by sea and voyage charters. This recognizes a well-established custom, which has become part of the business practice of shipowners and insurers, that freight paid in advance under a voyage charter-party is not recoverable even though the completion of the voyage is frustrated. The second (ii) contracts of insurance is a contract of insurance. The third concerns the sale of goods (iii) sale of goods S. 2 (5) (c) any contract to which section seven of the Sale of Goods Act, 1893⁵ (which avoids contracts for the sale of specific goods which

¹ (1867), L.R. 2 C.P. 651; *supra*, p. 447.

² Glanville Williams, *Law Reform (Frustrated Contracts) Act*, 1943.

³ The question is, of course, really one of insurance: 'Who shall insure?'

⁴ *Viz. infra*, p. 561.

⁵ 56 & 57 Vict., c. 71.

perish before the risk has passed to the buyer) applies or any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

It will be remembered that the general rule in the case of the sale of goods is that they are at the risk of the person whose property they are: *res perit domino*.¹ Where there is a sale of specific goods property in the goods normally passes to the buyer at the time the contract is made,² and so it follows that they are also at his risk. To this type of contract the Act has no application:

Suppose that *A* buys from a shopkeeper, *B*, a particular wardrobe, arranging for it to be delivered to him next day. During the night the shop catches fire and the wardrobe is destroyed. The risk has passed to *A* and he must pay the purchase price.

But the sub-section quoted above also exempts cases where there is an agreement to sell specific goods and the risk has not yet passed to the buyer. If the goods then perish, the contract is *avoided*³ and the 1943 Act does not apply.

We may also note that if the goods are unascertained at the time the contract is made, the doctrine of frustration rarely, if ever, applies. If *A* agrees to sell to *B* 'six hundred tons of coal', there can be no frustration of this contract. Even though *A* may have had in mind a particular source, this assumption is not common to both parties. The contract can be fulfilled at any time and *A* must obtain sufficient coal from another source or be liable for breach.⁴ On the other hand, if the goods, though unascertained, are to come from a source which is specifically defined, for example, 'six hundred tons of coal from the ship *Rose Marie* now in dock', and subsequently the ship and cargo are destroyed by fire, the contract is frustrated. In *Howell v. Coupland*:⁵

Unascertained goods—contract rarely frustrated

but if source defined doctrine applies

The defendant agreed to sell to the plaintiff 200 tons of potatoes to be grown on a particular field. The crop failed. In answer to the plaintiff's claim for non-delivery, the defendant pleaded frustration.

It was held that the contract was frustrated. Mellish L.J. said:⁶

This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an

¹ *Ibid.*, s. 20.

² *Ibid.*, s. 18, Rule 1.

³ *Ibid.*, s. 7.

⁴ *Blackburn Bobbin Co., Ltd. v. Allen (T. W.) & Sons, Ltd.*, [1918] 2 K.B. 467; *supra*, p. 444. Cf. *Re Badische Co.*, [1921] 2 Ch. 331.

⁵ (1876), 1 Q.B.D. 258.

⁶ At p. 262.

agreement to sell and buy 200 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible.

It is submitted that this type of agreement is not caught by the Sale of Goods Act, section 7, but is one to which the 1943 Act applies.

CHAPTER XVI

DISCHARGE BY OPERATION OF LAW

THERE are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, and these we will briefly consider.

Merger

If a higher security is accepted in the place of a lower, the security which in the eye of the law is inferior in operative power,¹ in the absence of a contrary intention manifested by the parties, merges and is extinguished in the higher.

We shall see an instance of this in the case of a judgment recovered which extinguishes by merger the right of action arising from breach of contract. And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged. The rules governing this process may thus be summarized:

- (a) The two securities must be different in their legal operation, the one of a higher efficacy than the other.² A second security taken in addition to one similar in character will not affect its validity, unless there is discharge by substituted agreement.³
- (b) The subject-matter of the two securities must be identical.
- (c) The parties must be the same.

The rights and liabilities under a contract are also extinguished if they become vested by assignment or otherwise in the same person, for a man cannot contract with himself. So where a term of years becomes vested in the immediate reversioner, the term normally merges in the reversion and all covenants attached to it are extinguished.⁴ Similarly, a bill of exchange is discharged, if the acceptor should eventually become the holder of it.⁵

¹ *Twopenny v. Young* (1824), 3 B. & C. 208.

² *Higgen's Case* (1605), 6 Co. Rep. 44b.

³ *Holmes v. Bell* (1841), 3 M. & G. 213.

⁴ *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631. By a rule of equity, however, the intention of the parties may operate to prevent the occurrence of such merger. Under the provisions of the Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 25 (4) and (11), the equitable rule now prevails in all cases.

⁵ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 61.

Alteration or Loss of a Written Instrument

Rule as to
alteration

If a deed or contract in writing is altered by addition or erasure, it is discharged, except as against a party making or assenting to the alteration, for 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected'.¹

This principle is subject to the following rules:

(a) The alteration must be made by a party to the contract, or by one holding the document on behalf of a party to the contract and for his benefit.² Alteration by accident or mistake occurring under such circumstances as to negative the idea of intention will not invalidate the document.³

(b) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

(c) The alteration must be made in a material part. What amounts to a material alteration necessarily depends upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. In a Bank of England note an alteration in the number of the note is not an alteration of the contractual terms which the document contains; but the fact that a bank note is a part of the currency, and that the number placed on it is put to important uses by the Bank and by the public for the detection of forgery and theft, causes an alteration in the number to be regarded as material and to invalidate the note.⁴

Bills of
Exchange

An alteration, therefore, to effect a discharge of the contract, need not be an alteration of the *contract*, but must be 'an alteration of the instrument in a material way.' The Bills of Exchange Act, 1882, section 64,⁵ after enacting that where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers, provides that a bill shall not be avoided as against a holder in due course, though it has been materially altered, if the alteration is not apparent, and the holder may enforce payment of it according to its original tenour.

¹ *Master v. Miller* (1791), 4 Term Rep. 320, *per* Lord Kenyon at p. 329.

² *Pattinson v. Luckley* (1875), L.R. 10 Ex. 330, except where alteration by a stranger raises doubts as to the identity of the contract.

³ *Hongkong & Shanghai Banking Corporation v. Lo Lee Shi*, [1928] A.C. 181.

⁴ *Suffell v. Bank of England* (1882), 9 Q.B.D. 555.

⁵ 45 & 46 Vict., c. 61.

The loss of a written instrument only affects the rights of the parties in so far as it may occasion a difficulty of proof. In the case of bills of exchange and promissory notes, if the holder of the instrument loses it, he may require the drawer to give him another bill upon his giving an indemnity against possible claims.¹

Bankruptcy

A contract is not discharged by the bankruptcy of one of the parties to it;² but it effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the Court an order of discharge. It is sufficient to call attention to this mode of discharge, without entering into a discussion of the nature and effects of bankruptcy, or the provisions of the Bankruptcy Act, 1914,³ which consolidates earlier enactments on the subject.

When a man becomes bankrupt his property passes to his trustee who can, as far as rights *ex contractu* are concerned (with certain exceptions such as contracts to marry),⁴ exercise the rights of the bankrupt, and can also do what the bankrupt could not do, since he can repudiate contracts if they appear to be unprofitable.⁵

When the bankrupt obtains an order of discharge he is discharged from all debts provable under the bankruptcy, with certain exceptions, whether or not they were proved, and even if the creditor was in ignorance of the bankruptcy proceedings.⁶ But the bankrupt's discharge may also be granted subject to conditions. The Court may require that he shall consent to judgment being entered against him for debts unsatisfied at the date of the discharge;⁷ and execution may be issued on such judgment with leave of the Court.

In no case is the bankrupt discharged from liability incurred by fraud or fraudulent breach of trust committed by him.⁸

¹ *Ibid.*, s. 69.

² *Re Edwards. Ex parte Chalmers* (1873), L.R. 8 Ch. App. 289.

³ 4 & 5 Geo. V, c. 59, as amended by the Bankruptcy (Amendment) Act, 1926 (16 & 17 Geo. V, c. 7).

⁴ *Viz. supra*, p. 390.

⁵ Bankruptcy Act, 1914 (4 & 5 Geo. V, c. 59), s. 54 (1).

⁶ *Ibid.*, s. 28.

⁷ *Ibid.*, s. 26 (2).

⁸ *Ibid.*, s. 28 (1).

PART V
REMEDIES FOR BREACH OF
CONTRACT

CHAPTER XVII. REMEDIES FOR BREACH OF
CONTRACT

CHAPTER XVII

REMEDIES FOR BREACH OF CONTRACT

WE have already endeavoured to state the rules which govern the discharge of a contract by breach, and it now remains to consider the various remedies which are open to the person injured by the breach, whether the breach is of such a kind as to justify him in treating the contract as discharged or not.

Remedies
in the event
of breach

These remedies fall under three heads:

1. Every breach of contract entitles the injured party to damages for the loss he has suffered. Damages
2. If the injured party, when the breach occurs, has already done part, though not all, of what he was bound to do under the contract, he may be entitled to claim the value of what he has done. In that case he is said to sue upon a *quantum meruit*. Quantum
meruit
3. In certain circumstances the injured party may obtain a decree for the specific performance of the contract, or an injunction to restrain its breach. These are equitable remedies and are generally granted at the discretion of the Court. Specific
perform-
ance and
injunction

In this chapter we shall consider each of these remedies in turn, and also how the rights of action created by a breach of contract may be extinguished or discharged.

I. DAMAGES

Except in the case of a debt, the repayment of which may be specifically enforced at common law, the common law remedy for breach of a contractual promise is that of damages.

Damages

Unless the parties themselves limit, or fix, the amount of damages to be awarded, the assessment of damages is a matter for the jury or for the judge sitting as a jury. But the law will not compel the party in default to assume liability for all the loss which may conceivably have been suffered by the injured party as a consequence of the breach. Certain losses may be too 'remote', and for these the plaintiff is not entitled to compensation. The first question to be asked is therefore this—When a contract is broken and action is brought upon it, how are we

to arrive at the amount which the plaintiff, if successful, is entitled to recover? This question is usually known as that of the measure of damages.

Measure of Damages

Rule as to
measure of
damages

The foundation of the modern law of damages is to be found in the judgment of Alderson B. in the Court of Exchequer in the case of *Hadley v. Baxendale*:¹

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

This statement of the law is generally known as 'the rule in *Hadley v. Baxendale*', and it will be seen that it lays down that damages are recoverable in two cases: (1) when they arise 'naturally, i.e., according to the usual course of things' from the breach, and (2) when they are 'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'.

Its effect is further explained by Alderson B. as follows:²

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

From this it will be seen that liability under the second branch of the rule will depend upon the special circumstances made known to the party in default at the time he made the contract.

¹ (1854), 9 Exch. 341, at p. 354.

² *Ibid.*, at pp. 354, 355.

In the case in which these principles were formulated:

The plaintiffs' mill was stopped by the breakage of a crankshaft, and it was necessary to send the crankshaft to the makers as a pattern for a new one. The defendants, who were carriers, undertook to deliver the shaft to the makers, but the only information given to them was 'that the article to be carried was the broken shaft of a mill, and that the plaintiffs were millers of that mill'.¹ By some neglect on their part the delivery of the shaft was delayed, and in consequence the mill could not be restarted until some time after it could otherwise have been. The plaintiffs lost profits which they would otherwise have made.

The question was whether this loss of profits ought to be taken into account in estimating the damages. Applying the principles quoted above, the Court pointed out that the circumstances communicated to the defendants did not show that a delay in the delivery of the shaft would entail loss of profits of the mill; the plaintiffs might have had another shaft, or there might have been some other defect in the machinery to cause the stoppage. Accordingly they could not recover for this loss:

It is obvious [said the Court²] that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants.

For some time the two branches of the rule seem to have been regarded as embodying two distinct propositions to which different considerations applied. The first branch, it was said, covered damage which, even if not contemplated by the parties, arose 'naturally', in the sense of 'directly', without any break in the chain of causation, from the breach.³ It is, of course,

Effect of
two
branches
of rule

¹ *Ibid.*, per Alderson B. at p. 355. It was pointed out by Asquith L.J. in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 2 K.B. 528, at p. 547, that the headnote is misleading in that it wrongly ascribes to the defendants knowledge that the mill was stopped.

² *Ibid.*, per Alderson B. at p. 356.

³ *Weld-Blundell v. Stephens*, [1920] A.C. 956, per Lord Sumner at p. 983.

settled law that in an action in tort such damage is recoverable,¹ and it was argued that, to this extent, the rules in tort and contract were the same.² The second branch, on the other hand, covered damage such as the party in default must, from the circumstances known to him at the time of contracting, be deemed to have foreseen as the probable result of its breach.

Both
governed
by same
principle This dichotomy is now considered to be erroneous. The relation between the two branches has been clearly elucidated by Asquith L.J., delivering the judgment of the Court of Appeal in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*³ The general principle which governs both branches of the rule is that the injured party may recover only such part of the loss actually resulting as was, at the time of making the contract, reasonably foreseeable as liable to result from the breach. What was so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. This knowledge, however, may be 'imputed' or 'actual'. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' (whether he actually does so or not), and, therefore, to know what loss is liable to result from a breach in that ordinary course. This is the subject-matter of the first branch of the rule. But besides this imputed knowledge which the contract-breaker is presumed to possess, there may have to be added in a particular case knowledge which he actually does possess of special circumstances outside the ordinary course of things and which would increase the loss. Such a situation attracts the operation of the second branch of the rule and makes this additional loss recoverable.

of fore-
seeability It is therefore established that the test under both branches of the rule in *Hadley v. Baxendale* is the same: recovery depends on foreseeability. The first branch deals with normal loss, and the test is an objective one. The second deals with abnormal loss, and the test is subjective in so far as it requires actual and not merely imputed knowledge. This does not mean to say that causation is completely excluded, for it is still necessary to determine the preliminary question whether or not the damage was caused by the breach.⁴ But as a test of remoteness it has

¹ *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560; *Liesbosch Dredger v. Edison S.S.*, [1923] A.C. 449; *Thurogood v. Van Den Berghs and Jurgens, Ltd.*, [1951] 2 K.B. 537.

² Lord Wright, *Essays*, iv. 96.

³ [1949] 2 K.B. 528, at p. 539. See (1949), 65 L.Q.R. 137, 294.

⁴ *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A.C. 452; *Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196;

been finally and firmly excluded in favour of one of foreseeability.

Despite this single criterion, it will nevertheless be convenient to examine separately the operation of each branch of the rule, in view of the fact that each covers a different type of loss.

The two branches examined

(a) *The first branch of the rule in Hadley v. Baxendale*

This deals with damages which arise naturally, i.e. according to the usual course of things, from the breach.

The first branch

The Sale of Goods Act, 1893, contains statutory provisions for the assessment of damages for breach of a contract of sale which are founded on this branch of the rule.¹ The measure of damages for non-acceptance or for non-delivery is declared to be 'the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's or seller's breach of contract';² and where there is an available market for the goods in question this is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted or delivered, as the case may be, or, if no time was fixed, then at the time of the refusal to accept or deliver.³ The reason for this rule was thus expressed by Tindal C.J. in *Barrow v. Arnaud*:⁴

Damages under the Sale of Goods Act ss. 50, 51

Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied; for the seller may take his goods into the market and obtain the current price for them.

To illustrate this, let us take the following example of a failure by the seller to deliver the goods:

Suppose that *A* promises to sell and deliver to *B* 10,000 tons of coal at £10 5s. per ton on the 8th February. He fails to carry out his contract. On the 8th February the market price of coal of that quality is £10 10s. per ton.

Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp & Paper Mills, Ltd., [1955] 2 Q.B. 68.

¹ 56 & 57 Vict., c. 71, ss. 50, 51, and 53 (warranties).

² Ss. 50 (2) and 51 (2).

³ Ss. 50 (3) and 51 (3). Cf. *Charter v. Sullivan*, [1957] 2 Q.B. 117.

⁴ (1846) 8 Q.B. 604, at p. 609.

B can recover as damages for non-delivery the difference between the contract price and the market price on that day, viz. five shillings per ton. Similarly where the seller is late in delivering the goods, the damage is the difference between the market value at the time when they ought to have been delivered and the time when they actually were delivered.

The case of the buyer who fails to accept the goods is slightly more complicated. Although the normal rule is that the measure of damages is the difference between the contract price and the market price on the day fixed for acceptance, the seller, if he is a dealer, may, it seems, also recover his loss of profit on the sale. Thus in *W. L. Thompson, Ltd. v. Robinson (Gunmakers), Ltd.*¹

The defendants contracted to buy from the plaintiffs a new Vanguard car. The plaintiffs were motor-car dealers and the price of the car was that fixed by the manufacturers, which they were unable to vary in any way. The defendants refused to accept the car, but the plaintiffs managed to persuade their wholesale suppliers to take the car back. They nevertheless claimed from the defendants the loss of their profit on the sale.

The defendants claimed that the plaintiffs were entitled to only nominal damages, there being no difference between the market price of the car and the contract price. Upjohn J. refused to accept this contention. The Sale of Goods Act laid down only a *prima facie* rule, and the loss of profit was clearly foreseeable in the case under consideration. If the buyer delays in accepting delivery, he may be liable to the seller for any loss occasioned by his delay and also for a reasonable charge for the care and custody of the goods.² Otherwise the measure of damages is as above.

Carriage of goods The same principle also applies in cases of contracts for the sale and carriage of goods. If a carrier loses the goods which he has undertaken to deliver, the measure of damages is the market value of the goods at the time when they ought to have arrived, less the freight payable on safe delivery.³ If he delays in delivering the goods, it is the difference between the market value of the goods on the day on which they ought to have arrived and their market value on the day on which they did arrive.⁴

¹ [1955] Ch. 177. Cf. *Charter v. Sullivan*, [1957] 2 Q.B. 117.

² Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 37. Also under s. 48 (3) of the Act, an unpaid seller has the right to sell perishable goods, or any goods after notice, and to recover from the original buyer damages for any loss occasioned by the breach.

³ *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67, at p. 76.

⁴ *Wilson v. Lancs. & Yorks. Railway* (1861), 9 C.B., N.S. 632.

The carrier is presumed to foresee that such a loss will be sustained.

But quite apart from these special instances, damages will not be too remote if they flow from the normal business position of the parties, for the Court will assume that this is known to both of them. In *Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker (A/B)*:¹

Normal
business
position
of parties

A British vessel had been chartered from the appellant shipowners in April, 1939, to load a cargo of soya beans in Japan, and the charterers had nominated Karlshamn in Sweden as the port of discharge. In normal circumstances the vessel would have reached that port in July, but owing to the defective state of the boilers she was unseaworthy and did not arrive in European waters until September. By that time, however, war had broken out between Great Britain and Germany, and the vessel was ordered by the British Admiralty to proceed to and discharge at Glasgow. The respondents, a Swedish Company who had purchased the cargo, required the beans for their business in Sweden as there were none available there. They consequently incurred expenses in having them forwarded to Karlshamn in neutral ships, and in this action claimed to recover the amount of these expenses.

The House of Lords held that they were entitled to do so. Lord Wright pointed out that the question in all such cases must always be 'what reasonable business men must be taken to have contemplated as the natural and probable result if the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business'.² In the present case, the possibility of war must have been present in the minds of the parties, and experienced business men would know that one of the risks that would be consequent upon prolongation of the voyage at that time would be the diversion of the vessel by the order of the Admiralty. The damage was therefore not too remote a consequence of the unseaworthiness of the ship, and the respondents could recover the cost of transhipment.

It is immaterial that the *breach* was of a type not reasonably to be anticipated, for the parties naturally contemplate performance and not breach. Thus in *Banco de Portugal v. Waterlow & Sons, Ltd.*:³

Immaterial
that breach
not fore-
seen

A firm of printers agreed to print for the Bank of Portugal a quantity of Portuguese banknotes of a particular type. They negligently delivered

¹ [1949] A.C. 196.

² At p. 224.

³ [1932] A.C. 452. See *The Portuguese Bank-note Case*, by Sir Cecil Kisch for an exciting account of this case.

to one M., the head of an international band of criminals, some 580,000 of these notes, and these were subsequently put into circulation in Portugal. Upon discovery of the fraud, the Bank issued notices withdrawing from circulation all notes of that type, and undertook to exchange them for other notes. The Bank then brought an action against the printers claiming as damages for breach of contract the value of the notes exchanged, and the cost of printing the genuine notes withdrawn.

It was held by a majority of the House of Lords that these losses were recoverable. The damage suffered, although the result of a breach which could scarcely be said to have been in the contemplation of the parties at the time they made the contract, was nevertheless to be considered as flowing from the business position of the parties and arising naturally from the breach.

Exceptional
loss not
covered by
first branch

On the other hand, the first branch of the rule in *Hadley v. Baxendale* does not cover losses which are the consequence of abnormal and exceptional circumstances not known to the party in default at the time he entered into the agreement. In *Hadley v. Baxendale* itself, the plaintiffs were unable to recover damages arising from the fact that they had only one shaft, for this information had not been conveyed to the defendants. Again in *British Columbia Saw Mill Co. v. Nettleship*:¹

The plaintiffs delivered to the defendant to be shipped on the defendant's vessel certain cases of machinery intended for the erection of a sawmill at Vancouver. The defendant failed to deliver one of the cases, but was unaware of the fact that it contained a material part of the machinery without which the sawmill could not be erected at all. The plaintiffs claimed as damages not only the cost of replacing the lost parts, but also the loss incurred by the stoppage of their works during the time that the rest of the machinery remained useless owing to the absence of the lost parts.

It was held that the measure of damages was the cost of replacing the lost machinery at Vancouver only, and the Court said:²

The defendant is a carrier and not a manufacturer of goods supplied for a particular purpose. . . . He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could have been foreseen and reasonably expected, and to which he assented expressly or impliedly by entering into the contract.

Sub-sales
excluded

As applied to an action by a buyer for non-delivery of goods, this principle will exclude losses suffered by his entering into

¹ (1868), L.R. 3 C.P. 499.

² Ibid., per Bovill C.J. at p. 505.

sub-sales or forward contracts where these are unknown to the seller at the time of the contract. The loss of profit on such sales is too remote. This is clearly illustrated by *Horne v. Midland Railway Company*,¹ a case concerning the carriage of goods:

The plaintiff being under contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendants to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, and were consequently rejected by the intending purchasers. The plaintiff sought to recover, in addition to the ordinary loss for delay, the difference between the price at which the shoes were actually sold and the high price at which they would have been sold if they had been punctually delivered.

It was held that this damage was not recoverable unless it could be proved that the company were informed of, and undertook to be liable for, the exceptional loss which the plaintiff might suffer from an unpunctual delivery.

There may, however, be circumstances surrounding the particular contract and the business relations of the parties (as, for example, where the buyer is known to be a dealer in the goods in question) which will give rise to the implication that the seller knew, or ought to have known, that the goods were required for resale, and at an enhanced price.² Or there may be non-delivery or delayed delivery of what is on the face of it obviously a profit-earning chattel, for instance, a merchant or passenger ship, or some essential part of such a ship.³ In such cases the party injured will be entitled to recover the loss of profit which might normally be expected to arise if the contract were broken.

In *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*:⁴

The plaintiffs, a firm of launderers and dyers, wished to expand their business, and for this purpose entered into a contract with the defendants to purchase from them a new boiler. It was agreed that the boiler was to be delivered on June 5, but when the plaintiffs sent to collect the boiler on that day they were informed that it had been damaged by a fall and was not ready. The boiler was not, in fact, delivered until November. In

¹ (1873), 8 C.P. 131. Cf. *Cory v. Thames Ironworks Co., Ltd.* (1868), L.R. 3 Q.B. 181.

² *Hall v. Pim* (1928), 139 L.T. 50 (H.L.). Cf. Maugham L.J. in *The Arpad*, [1934] P. 189, at p. 230.

³ *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 2 K.B. 528, per Asquith L.J. at p. 536; *Fletcher v. Tayleur* (1855), 17 C.B. 21; *Saint Line v. Richardson*, [1940] 2 K.B. 99.

⁴ [1949] 2 K.B. 528.

consequence of this delay, the plaintiffs lost the profits which they would have earned during this period, and, in particular, certain highly lucrative dyeing contracts which they could have obtained with the Ministry of Supply. They sued *inter alia* to recover these losses.

In the Court of first instance, Streatfield J. held that the plaintiffs were not entitled to include in their measure of damages the loss of any business profits during the period of delay. His decision was reversed by the Court of Appeal. Asquith L.J. pointed out that the defendants knew before, and at the time of the contract, that the plaintiffs were laundrymen and dyers and required the boiler for immediate use in their business. From their own technical experience, and from the business relations existing between them, they must be presumed to have anticipated that some loss of profits would occur by reason of their delay. But in the absence of special knowledge on their part, they could not reasonably foresee the additional losses suffered by the plaintiffs because of their inability to accept the highly lucrative dyeing contracts. The case was therefore to be referred to an Official Referee who would decide as to what loss might reasonably be considered to be normal in the circumstances.

(b) *The second branch of the rule in Hadley v. Baxendale*

Second
branch
of rule

This deals with such damage 'as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'.

depends on
knowledge
of special
circum-
stances

As we have seen, its application depends upon the knowledge which the contract-breaker possesses at the time of the contract, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those circumstances will cause more loss. It is well illustrated by *Simpson v. London and North Western Railway Company*:¹

The plaintiff, a manufacturer, was in the habit of sending specimens of his goods for exhibition to agricultural shows. After exhibiting in a show at Bedford, he entrusted some of his samples to an agent of the defendant company for carriage to a show-ground at Newcastle. On the consignment note he wrote: 'Must be at Newcastle Monday certain.' Owing to a default on the part of the company, the samples arrived late for the Newcastle show. The plaintiff therefore claimed damages for his loss of profits at the show.

¹ (1876), 1 Q.B.D. 274.

It was held that the company was liable. The company's agent had knowledge of the special circumstances, that the goods were to be exhibited at the Newcastle show, and so should have contemplated that a delay in delivery might result in this loss.

Where there is a contract for the sale and delivery of goods, the buyer may recover as damages for failure to deliver the goods his loss of profits on a sub-sale or forward contract made by him, provided that the existence of the sub-sale was known to the seller at the time he entered into the agreement. Moreover, he may also recover from the seller any damages which he has been forced to pay to sub-purchasers, together with any costs reasonably incurred in defending an action against him by them.¹ The same principle also applies where the seller has given a warranty which he has failed to fulfil.² Thus in *Hammond & Co. v. Bussey*:³

Sub-sales
made
known
to seller

The defendant was a coal merchant and the plaintiffs were shipping agents at Dover. It was known to the defendant to be part of the plaintiffs' business to supply coal to steamships calling there. The plaintiffs contracted with the defendant for the supply of a quantity of 'steam-coal' for the purpose of being used in steamships, the defendants knowing at the time of the contract that the plaintiffs were buying the coal for re-sale as fit for the same purpose. The plaintiffs did so re-sell the coal, which was not fit for the purpose of steamships. An action was brought against them by their sub-purchasers, and was reasonably, but unsuccessfully, defended by them.

It was held that the plaintiffs might recover not only the damages paid by them to their sub-purchasers, but the costs incurred in defending the action, for this damage came within the second branch of the rule in *Hadley v. Baxendale*, the defendants having had special knowledge of the probability of the sub-contracts.

It is usually said that 'bare knowledge' of the exceptional circumstances surrounding the contract is sufficient to make the contract-breaker liable.⁴ But there is also considerable authority for the view that he should, in addition, either expressly or impliedly have contracted to assume liability for the abnormal loss. The mere communication to a party of

Is bare
knowledge
sufficient?

¹ *Agius v. Great Western Colliery Co.*, [1899] 1 Q.B. 413; *Pinnock Bros. v. Lewis and Peat*, [1923] 1 K.B. 690.

² Sale of Goods Act (56 & 57 Vict., c. 71), s. 53.

³ (1887), 20 Q.B.D. 79.

⁴ *Patrick v. Russo-British Grain Export Co.*, [1927] 2 K.B. 535, *per Salter J.* at p. 540.

the existence of special circumstances is not enough to make that party liable, in the event of breach, for damages which would be incurred in a similar contract not affected by such special circumstances; there must in addition be something to show that the contract was made *on the terms that* the defendant was to be liable for such special damages.

or must
it be a
matter of
special
terms?

This latter view finds support in the judgment of Willes J. in *British Columbia Saw Mill Co. v. Nettleship*,¹ and in that of Blackburn J. in *Horne v. Midland Railway Co.*,² where that distinguished judge even went so far as to say that 'in order that the notice may have any effect, it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss'. In *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*,³ Asquith L.J. seems to consider that the *British Columbia Saw Mill* case added a rider to the effect that this requirement must be fulfilled.

On the other hand, there seems to be no reported case where the liability of the defendant has turned solely upon the distinction between mere knowledge and an implied assumption of liability. Also it formed no part of the original expression of the rule by Alderson B. in *Hadley v. Baxendale*, where communication was said to be the determining factor.⁴ It may, however, be that the difference between these two views is not so great as at first appears. The special circumstances must be communicated within the contractual framework, and in such a way that it is clear that they are to be considered important. A casual intimation would be insufficient. But if these requirements are fulfilled, the Courts will be willing to imply that the defendant assumed liability for such foreseeable consequences as might arise from the existence of those circumstances.

*Compensatory Nature of Damages*⁵

Object of
awarding
damages

The object of awarding damages for breach of contract is to put the injured party into the position in which he would have been had there been performance and not breach. It is not to

¹ (1868), L.R. 3 C.P. 499, at p. 509.

² (1873), L.R. 8 C.P. 131, at p. 141.

³ [1949] 2 K.B. 528, at p. 538.

⁴ *Supra*, p. 460.

⁵ The principle upon which damages are assessed (quantification) is quite distinct from that which determines what damage, if any, is actionable (remoteness). In Private International Law the former is a procedural question and governed by the *lex fori*, the latter is substantive and governed by the proper law of the contract: *D'Almeida (F.) Araujo Lda. v. Sir Frederick Becker & Co., Ltd.*, [1953] 2 Q.B. 329.

put him in the position which he would have enjoyed had the contract never been made.

Also damages for breach of contract are given by way of compensation for loss suffered, and not by way of punishment for wrong inflicted. Hence the 'vindictive' or 'exemplary' damages of the law of tort have no place in the law of contract. To this rule, however, the action for breach of promise of marriage is an exception; in that case injury to the feelings of the disappointed party may be taken into account in the assessment of damages,¹ except where she (or he) is deceased and the action is brought for the benefit of her estate.²

Damages for breach of contract not vindictive

Moreover, the measure of damages is not affected by the motive or the manner of the breach. Thus in *Addis v. Gramophone Co., Ltd.*:³

The plaintiff was employed by the defendants as manager of their business in Calcutta at a salary of £15 per week together with a commission on trade done. He could be dismissed by six months' notice. The defendants wrongfully dismissed him, and in a harsh and humiliating manner.

The House of Lords held that, although he might recover a sum representing his wages for the period of notice and the commission which he would have earned during that period, he could not recover anything for his injured feelings or for the loss sustained from the fact that his dismissal made it more difficult for him to obtain employment. The rule is thus well settled, but it is not easy, either on grounds of fairness or of general principle, to justify the exclusion at least of the latter head of damage. It does not, however, prevent damages from being recovered for substantial inconvenience or discomfort arising from a breach. An illustration of this point is provided by *Hobbs v. London and South Western Railway Company*:⁴

Inconvenience and discomfort

The plaintiff, with his wife and children, took a ticket from Wimbledon on a midnight train represented by the defendant company to be travelling to Hampton Court where he lived. They were transported instead to Esher, where they were left to walk several miles home on a drizzling wet night.

It was held that the plaintiff could recover the sum of £8 to compensate him for the inconvenience of being obliged to walk

¹ *Finlay v. Chirney* (1888), 20 Q.B.D. 494, per Lord Esher M.R. at p. 498.

² Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. V, c. 41), s. 1 (2) (b); viz. *supra*, p. 390.

³ [1909] A.C. 488.

⁴ (1875), L.R. 10 Q.B. 111; *Bailey v. Bullock* (1950), 66 T.L.R. (Pt.2) 791.

home, but nothing for the medical expenses of his wife, who caught a cold, as this consequence was too remote.

Loss of reputation Damages for loss of reputation cannot be recovered,¹ although an exception does exist in the case of a banker who refuses to pay a customer's cheque when he has in his hands funds of the customer to meet it. If the customer is a tradesman, he can recover in respect of any loss to his trade reputation by the breach.² On the other hand, a distinction must be made between a breach of contract which causes injury to a reputation which a person already possesses, and one which deprives him of an opportunity, to which the contract entitles him, of enhancing his reputation.³ So an actor, whose contract entitles him to be advertised as playing a leading part at a well-known music-hall, may recover damages for the loss of publicity, though not for any injury that his failure to appear may cause to his existing reputation.⁴

Nominal damages Where the injured party has not, in fact, suffered any loss by reason of the breach of contract, the damages recoverable by him will be purely nominal; otherwise he is entitled to such a sum as will compensate him for the loss actually suffered. But this principle suffers an exception in those cases where the seller has failed to deliver goods bargained and sold, and the buyer brings an action for damages for breach. It will be remembered that section 51 (3) of the Sale of Goods Act, 1893,⁵ provides that the measure of damages for failure to deliver is *prima facie* to be ascertained by the difference between the contract price and the market price of the goods at the time when they ought to have been delivered. This general presumption is not rebutted merely because the buyer has contracted to sell the goods to a third party at a price lower⁶ or higher⁷ than the market price. Where, however, there is simply a delay in delivery,⁸ or where it is the buyer who is in breach of contract by his failure to accept the goods,⁹ the Courts will allow the statutory rule to be displaced upon proof that the goods were actually sold for

¹ *Last-Harris v. Thompson Brothers*, [1956] N.Z.L.R. 995 (New Zealand).

² If he is not a tradesman, he can recover only nominal damages: *Gibbons v. Westminster Bank*, [1939] 2 K.B. 882.

³ *Clayton and Waller v. Oliver*, [1930] A.C. 209.

⁴ *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536.

⁵ 56 & 57 Vict., c. 71.

⁶ *The Arpad*, [1934] P. 189.

⁷ *Williams Bros. v. Agius*, [1914] A.C. 510.

⁸ *Wertheim v. Chicoutimi Pulp Co., Ltd.*, [1911] A.C. 301.

⁹ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 50.

more than their market value.¹ This was the case in *Wertheim v. Chicoutimi Pulp Co., Ltd.*,² where the seller was late in delivering the goods. The market price of the goods at the time when they ought to have been delivered was 70s. per ton, and, at the time they were delivered, 42s. 6d. per ton. The measure of damages ought therefore to have been 27s. 6d. per ton, and this was the sum claimed by the buyer. But proof was adduced that he had actually sold the goods for 65s. per ton, and the Court held that he could only recover his actual loss, namely, 5s. per ton.

A plaintiff who brings an action for breach of warranty in respect of goods sold to him cannot recover both the whole capital loss in the value of the goods and also the whole of the profit (where admissible) which he would have made by his use of them, for this would be to allow him to recover damages twice over. In *Cullinane v. British 'Rema' Manufacturing Co., Ltd.*:³

Plaintiff cannot recover twice in respect of same breach

The plaintiff purchased from the defendants a clay pulverizing plant, the defendants warranting that the plant would be capable of pulverizing clay at the rate of six tons per hour. This warranty was not fulfilled, and the plaintiff claimed as damages for breach of contract (a) the difference between the purchase price of the plant and its residual value, and (b) his loss of profits from the date of installation to the date of trial of the action, a period of about three years.

The Court of Appeal held that these claims could not be cumulative but must be alternative. He could claim one or other, but not both. Lord Evershed M.R. used 'the simple agricultural analogy of the cow' to show why this was so:⁴

If, for example, A sells to B a heifer for £100, and warrants that for the next five lactations she will produce milk at the rate of four gallons a day, but it is discovered that the cow's performance is not at the rate of four gallons a day, but is only one gallon a day, and if a one-gallon-a-day cow is worth not £100 but £10, then the buyer might elect to follow one of two courses. He could claim to recover the difference between the £100 which he had paid for a four-gallon-a-day heifer and £10, the true value of the one-gallon-a-day heifer, and he would recover the difference, £90. That would put him in the position in which he would have been if he had bought, and intended to buy, the cow which in fact he got. Alternatively, he might say: 'I keep this cow and I shall sue you for the loss I have suffered because her performance was not as warranted: I am not getting four gallons but one gallon a day, and, therefore, I am losing what I would have got on the sales (less necessary expenditure) of,

¹ See generally Atiyah, *The Sale of Goods*, p. 191.

² [1911] A.C. 301.

³ [1954] 1 Q.B. 292.

⁴ At p. 303.

approximately, an extra thousand gallons a year.' . . . but it would be impossible to recover, in the hypothetical case, both the £90 (being the capital loss on the cow) and the full amount of the loss due to the shortage of milk.

Difficulty of assessment no bar Difficulty in assessing damages does not disentitle a plaintiff from having an attempt made to assess them, unless they depend altogether on remote and hypothetical possibilities. This can be seen from the case of *Simpson v. London and North Western Railway Company*,¹ previously cited, where the plaintiff was deprived of the opportunity of exhibiting his products at a show. Although the ascertainment of damages was difficult and speculative, it was held that this was no reason for not giving any damages at all. So, too, in *Chaplin v. Hicks*,² where a candidate in a beauty competition, who had successfully passed the earlier stages of the competition, was, in breach of contract, not allowed to compete in the later stages, she was awarded substantial damages for the loss of the chance of being successful of which she had been wrongly deprived.

Duty to Mitigate Damage Suffered

Mitigation of damages It follows from the rule that damages are compensatory and not penal that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

Thus, although the measure of damages for breach of a contract to deliver goods is ordinarily the difference between the contract price of the goods and the market price at the time when delivery should have been given, yet if the plaintiff might have mitigated his loss, as, for example, by an immediate purchase at a low price of goods to replace those not delivered, or by accepting a reasonable offer from the defendant to make good part of the loss, this is to be taken into account in assessing his damages.³ It is a question of fact in each case, and not of law, whether he has acted as a reasonable man might have been expected to act.⁴

¹ (1876), 1 Q.B.D. 274; *supra*, p. 468. See also, *Chaplin v. Hicks*, [1911] 2 K.B. 786. Cf. *Sapwell v. Bass*, [1910] 2 K.B. 486. ² [1911] 2 K.B. 786.

³ *Brace v. Calder*, [1895] 2 Q.B. 253; *Payzu v. Saunders*, [1919] 2 K.B. 581.

⁴ See, for example, *Interoffice Telephones, Ltd. v. Robert Freeman Co., Ltd.*, [1958] 1 Q.B. 190.

Assessment of Damages by the Parties

The parties to a contract, not infrequently assess the damages at which they rate a breach of contract by one or both of them, and introduce their assessment into the terms of the contract. By so doing, however, they do not exclude the application of the rule that damages for breach are to be compensatory and not penal, and it is a question of the proper construction of the contract to decide whether a sum fixed in this way, however the parties may have described it, is a 'penalty', in which case it cannot be recovered, or a genuine attempt to 'liquidate', that is to say, to reduce to certainty, prospective damages of an uncertain amount, in which case the sum will be recoverable.

In many legal systems the parties can agree to pay a penalty, in addition to full damages, in order to prevent or penalize a breach; but in English law, equity would relieve against penalties, cutting them down to the actual damage suffered. This doctrine was taken up and applied by the common law, so that it became the rule in both jurisdictions. The Court will accept as liquidated damages the sum fixed by the parties if it is a genuine pre-estimate of the damage which seems likely to be caused if the breach provided for should occur. The question is one of construction, to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract, not as at the time of breach.¹ Or, again, if, although it is not an estimate of the probable damage, the parties have fixed that sum because they were agreed in limiting the damages recoverable to an amount less than that which a breach would probably cause, it will similarly be accepted by the Court.² On the other hand, if the sum was fixed *in terrorem*, the provision will be considered to be a penalty. It will be unenforceable, and the damages incurred must be assessed in the usual way.

In construing the terms 'penalty' and 'liquidated damages' when inserted in a contract, the Courts will not be bound by the phraseology used, for 'Equity looks to the intent rather than to the form'. The parties may call the sum specified 'liquidated damages' if they wish, but if the Court finds it to be a penalty, it will be treated as such. Conversely, if the parties have described the sum fixed as a 'penalty', but it turns out to

¹ *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*, [1915] A.C. 79.

² *Cellulose Acetate Silk Co., Ltd. v. Widnes Foundry (1925), Ltd.*, [1933] A.C. 20.

be a genuine pre-estimate of the loss, it will be treated as liquidated damages, with the result that the injured party cannot disregard it and sue for the actual loss. In *Cellulose Acetate Silk Co., Ltd. v. Widnes Foundry (1925), Ltd.*:¹

The plaintiffs agreed to pay 'by way of penalty the sum of £20 per week for every week we exceed 18 weeks' in the delivery of certain machinery. Calculated on this basis, the damages recoverable by the defendants on breach amounted to some £600, but their actual loss amounted to £5,850. They therefore claimed that they were entitled to disregard the penalty and to sue for the damages actually suffered.

It was, however, clear from the circumstances that the parties must have known that the damage which would be incurred might greatly exceed this sum. The House of Lords therefore held that the sum was not a penalty, but was merely the amount which the plaintiffs had agreed to pay by way of compensation for delay, and that the damages must be limited to this agreed amount.

Bonds As regards bonds, statute has also intervened to grant relief. A bond is in form a promise to pay a penal sum, generally on the non-performance of a covenant or agreement contained or recited in the bond. In the case of the common money bond,² under 4 & 5 Anne, c. 16, the promisee can recover only his principal and interest, and costs if any. But a bond may also take the form of a promise to pay a sum in compensation for damages arising from an act or acts specified in the bond.³ In the case of bonds or other contracts containing provisions of this nature, it has been laid down that 'the judge must look to all the circumstances of each particular contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was'.⁴ If they intended to impose a penalty, it cannot be recovered.

Rules for ascertaining whether penalty or liquidated damages The leading case on this topic is that of *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*:⁵

The appellants, manufacturers of motor covers, tyres and tubes, sold some of these goods to the respondents who contracted not to re-sell them, or offer them for sale, at a price below the manufacturers' list prices. The

¹ [1933] A.C. 20.

² E.g. whereby the debtor promised to pay principal and interest, and a penal sum, usually double, if he did not repay by the required date.

³ *Strickland v. Williams*, [1899] 1 Q.B. 382.

⁴ *Pye v. British Automobile Commercial Syndicate, Ltd.*, [1906] 1 K.B. 425, per Bigham J. at p. 429.

⁵ [1915] A.C. 79.

respondents further covenanted to pay the sum of £5 by way of liquidated damages for every breach of this agreement. They sold a tyre at less than the list price, and were sued by the appellants for damages for breach.

The House of Lords held that the sum fixed by the parties was a genuine pre-estimate of the damage which might ensue and not a penalty. In the course of his speech Lord Dunedin laid down the following rules:¹

(i) 'It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.'

Extrava-
gant esti-
mate a
penalty

An illustration is provided by the Earl of Halsbury in an earlier case, where he said:²

For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £50, you were to pay a million of money as penalty, the extravagance of that would be at once apparent.

The question is one of fact in each particular case. In hire-purchase agreements, for example, finance companies often provide that, in the event of non-payment of an instalment, not only shall they be entitled to take possession of the object hired and to forfeit the instalments already paid, but that the hirer shall also pay a certain sum as compensation for 'depreciation'. The Courts may, however, hold this to be a penalty *in terrorem*.³ But there is some doubt whether a person who purchases goods by instalments is entitled to equitable relief against forfeiture of the purchase money which the vendor is contractually entitled to retain.⁴

(ii) 'It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.'

Payment
of greater
sum a
penalty

The most obvious example is where a borrower of money promises to pay the lender an additional sum if he does not repay the money by a fixed day. And in *Kemble v. Farren*.⁵

The defendant agreed with the plaintiff to act as principal comedian at Covent Garden Theatre for four seasons at £3 6s. 8d. a night. The contract provided that if either party refused to fulfil the agreement or any

¹ At p. 87.

² *Clydebank Engineering and Shipbuilding Co., Ltd. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A.C. 6, at p. 10.

³ *London Trust, Ltd. v. Hurrell*, [1955] 1 W.L.R. 391.

⁴ See the differing views of the Court of Appeal in *Stockloser v. Johnson*, [1954] 1 Q.B. 476; *Wallis v. Smith* (1882), 21 Ch. D. 243; *Prince* (1957), 20 Mod. L.R. 620.

⁵ (1829), 6 Bing. 141.

part thereof, such party should pay to the other the sum of £1,000 as 'liquidated damages'. The defendant refused to act during the second season.

It was held that the stipulation was penal. The obligation to pay £1,000 might have arisen upon failure to pay £3. 6s. 8d. and was therefore quite obviously a penalty.

Single sum
upon
occurrence
of different
events

(iii) 'There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.'

An illustration is offered by *Ford Motor Co. v. Armstrong*:¹

The defendant was a retailer and the plaintiffs were manufacturers of motor-cars. He agreed *inter alia* not to sell any one of the plaintiffs' cars, or any part, below the listed price. For every breach of this agreement he was to pay £250, as 'agreed damages'.

A majority of the Court of Appeal held that this was a penalty. The defendant might have become bound to pay the sum of £250 for the breach of some term which would cause only trifling damage. Similarly in *Kemble v. Farren*, this same consideration provided an additional reason for the Court to hold that the £1,000 was a penalty:²

If, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms.

On the other hand:

Difficulty
of estimation
no bar

(iv) 'It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility.'

For example, in the *Dunlop Tyre Case* itself, the stipulated sum of £5 could only, at the most, be a very rough and ready estimate of the possible damage which might be suffered if a trader undercut the manufacturers' listed price.

¹ (1915), 31 T.L.R. 267.

² (1829), 6 Bing. 141, at p. 148.

But these rules are no more than presumptions as to the intention of the parties; they may be rebutted by evidence of a contrary intention, appearing from a consideration of the contract as a whole.¹ Presump-
tions only

Interest on Damages

Interest on the whole or any part of a debt or damages recovered may now, under the Law Reform (Miscellaneous Provisions) Act, 1934, section 3,² if the Court thinks fit, be included in the sum for which judgment is given, at such rate as the Court thinks fit, for the whole or any part of the period between the date when the cause of action arose and the date of judgment. But the Act does not authorize the giving of interest on interest, nor does it apply to a debt on which interest is payable as of right by virtue of an agreement or otherwise, nor to the damages recoverable for the dishonour of a bill of exchange, as to which the Bills of Exchange Act, 1882, section 57,³ contains special provisions. Interest

II. QUANTUM MERUIT

If our law were scientifically arranged, it would probably regard the rules about *quantum meruit* claims which we are about to consider merely as rules for the assessment of damages in a special case. But these rules have come down to us from a time when there were certain procedural advantages in framing an action in *quantum meruit* rather than as damages for breach of contract, and though these advantages have now disappeared, the distinction still remains. *Quantum meruit* is still a remedy which is alternative to, rather than a form of, damages. Quantum
meruit
claims

The case for which it provides is where the party injured by a breach of contract has, at the time when the breach occurs, done part, but not all, of that which he is bound to do under the contract, and is seeking to be recompensed for the value of what he has done.

Suppose that by the terms of a contract *A* is to do a certain piece of work for *B* for a lump sum, payable on its completion. *B* repudiates the contract when *A* has done part of the work.

It is clear that if, for whatever reason, *A* fails to complete the work as stipulated, he cannot demand any remuneration for it

¹ *Pye v. British Automobile Commercial Syndicate, Ltd.*, [1906] 1 K.B. 425.

² 24 & 25 Geo. V, c. 41.

³ 45 & 46 Vict., c. 61.

under the contract.¹ But it would be most unjust if the law provided him with no remedy when his failure is due to *B*'s breach. In such a case, whatever the contract may say, if what *A* has done can be estimated at a money value, the law ought to give him some redress, and so it does: it says that he may claim *quantum meruit*, the reasonable value of the work done. 'If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received.'²

are really
quasi-
contractual The right to claim *quantum meruit* does not arise out of the contract as the right to damages does; it is a right conferred outside the contract by the law, a quasi-contractual right, therefore, and not a contractual one, and it would be more correct to describe it as an incident of, rather than a remedy for, the breach of a contract. We shall see later that breach of contract is only one of several occasions which give rise to *quantum meruit* claims,³ and that such claims are sometimes quasi-contractual, as here, but that sometimes they are genuinely contractual.

Require-
ments In order that this remedy should be available, certain conditions must be fulfilled.

(i) contract
must be
discharged First, a *quantum meruit* claim is only available if the original contract has been discharged. The contract must have been broken by the defendant in such a way as to entitle the plaintiff, according to the principles discussed in Chapter XIV, to regard himself as discharged from any further performance, and he must have elected to do so. If the contract is still, as it is said, 'open', he cannot use the *quantum meruit* remedy, but must rely on his remedy in damages.⁴

(ii) claim
must be
brought
by party
not in
default Secondly, the claim must be brought by the party not in default. The party who breaks the contract, even though he may have partially performed some part of his obligation, is not entitled to a *quantum meruit* for the work which he has done.

Assessment If these requirements are satisfied, —the party who has absolutely refused to perform, or who has rendered himself incapable of performing, his part of the contract, puts it in the power of the other party either to sue for a breach of it, or to

¹ Except where the work is defective only in the most minor respects. See *Dakin v. Lee*, [1916] 1 K.B. 566, and the doctrine of substantial performance, *supra*, p. 422.

² *Mavor v. Pyne* (1825), 3 Bing. 285, *per* Best C.J. at p. 288.

³ *Infra*, p. 558.

⁴ *Heyman v. Darwins, Ltd.*, [1942] A.C. 356.

rescind the contract and sue on a *quantum meruit* for the work actually done.¹ If the injured party chooses the latter remedy, the law proceeds on a principle of assessment which differs from that which it applies in assessing damages for breach of contract. For whereas the purpose of damages is to place the injured party, as nearly as may be, in the position which he would have been in if the other party had performed the contract, the purpose of *quantum meruit* is to recompense him for the value of the work which he has done, i.e. to restore him to the position which he would have been in if the contract had never been made. In other words, damages are compensatory, and *quantum meruit* is restitutory, and, as Lord Porter pointed out in *Heyman v. Darwins, Ltd.*,² the sum which the injured party is entitled to recover may differ according as it is assessed on one or the other of these two principles.

Suppose, for example, that *A* has undertaken to serve *B* for one year for a salary of £1,200, payable at the end of the year. At the end of eight months, *B* wrongfully dismisses him.

If *A* asks for damages, he will receive £1,200, which is the sum which he would have received (subject, however, to his duty to mitigate damages) had *B* performed the contract. But if he asks for *quantum meruit*, he is asking to be paid the reasonable value of his services which, in a simple case like the present, would probably be a proportionate part of the contractual sum, that is, £800. There might, however, be some special circumstances which would show that the contractual sum was not the real value of the services, and that they were worth more than had been there provided for. In such a situation, *A* might well find it to be more profitable to sue for *quantum meruit* than to claim damages.³

Two cases provide useful illustrations of the remedy. In *Planché v. Colburn*:⁴ Illustrations

The defendants had commenced a periodical publication, called 'The Juvenile Library', and had engaged the plaintiff to write a volume on ancient armour for it. For this he was to receive the sum of £100 on completion. When he had completed part, but not the whole, of his volume, the defendants abandoned the publication.

The plaintiff was held entitled to retain a verdict for £50 which the jury had awarded him. The report does not make it quite

¹ *De Bernardy v. Harding* (1853), 8 Ex. 822, per Alderson B. at p. 824.

² [1942] A.C. 356, at p. 397.

³ e.g. *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] A.C. 696; *supra*, p. 435.

⁴ (1831), 8 Bing. 14.

clear whether this sum was damages for the breach, or a *quantum meruit* for work done, since he had made alternative claims; but the latter claim would seem to be correct, as there appears to be no evidence that he completed and delivered or tendered the work, which would have to be done before payment was due. Tindal C.J. says:¹

I agree that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his labour.

Again in *De Bernardy v. Harding*:²

The defendant appointed the plaintiff his agent to advertise and sell tickets for seats to view the funeral of the Duke of Wellington, the plaintiff to receive a commission on the tickets sold. The defendant wrongfully revoked the plaintiff's authority after he had already incurred certain expenses in carrying out the contract.

It was held that the plaintiff was entitled to recover *quantum meruit* for the expenses so incurred.

III. EQUITABLE REMEDIES

Remedies
in equity

Under certain circumstances, a promise to do a thing may be enforced by an order for specific performance, and an express or implied promise to forbear by an injunction.

These remedies were once exclusively administered by the Court of Chancery. They supplemented the remedy in damages offered by the common law, which regarded the breach of a contract as the breach of a purely personal obligation. Equity, however, would sometimes regard a contract as conferring a proprietary interest on the person to whom property was to be transferred, and, even where this was not the case, would come to the aid of the injured party where damages would be, for him, an inadequate redress. Since the Judicature Acts, these two forms of equitable relief may be granted by any division of the High Court.³

¹ At p. 16.

² (1853), 8 Ex. 822.

³ Under Lord Cairns' Act (21 & 22 Vict., c. 27) the Court of Chancery was empowered, in all cases in which it had jurisdiction to grant an injunction or to order specific performance, to grant damages either instead of, or in addition to, these equitable remedies. Also under the Common Law Procedure Act, 1854

Specific Performance

An order for specific performance is one by which the Court directs the defendant to perform the contract which he has made, and in accordance with its terms. It will be enough here to illustrate the main characteristics of this remedy—that it is supplementary and that it is discretionary.

As specific performance is supplementary to the common law remedy of damages, it follows that it will not be granted where damages provide adequate relief:

This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules.¹

Damages may be a very insufficient remedy for the breach of a contract for the sale of a plot of land, or for the granting of a lease, for the choice of the intending purchaser or lessee may have been determined by considerations of profit, health, convenience, or neighbourhood—circumstances which render the land of peculiar value to him. Further, as equity would not favour one party alone, the same remedy was made available to the vendor or lessor. Thus it is that contracts concerning land are the most common example of the cases in which the Court grants a decree. Where personalty is concerned, damages can usually be adjusted so as to compensate for (let us say) a failure to supply goods. In the case of an agreement to sell goods, Chancery would only grant specific performance where the chattels sold possessed a special beauty, rarity, or interest;² but now under section 52 of the Sale of Goods Act, 1893,³ in the case of a contract to deliver specific or ascertained goods, the Court may, if it thinks fit, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.⁴

(17 & 18 Vict., c. 125), s. 79, the common law courts were given a limited power to grant injunctions. But it was not until the Judicature Acts of 1873 and 1875 (36 & 37 Vict., c. 66; 38 & 39 Vict., c. 77) that the relief became comprehensive.

¹ *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, per Kay L.J. at p. 126.

² *Holroyd v. Marshall* (1862), 10 H.L. Cas. 191, at p. 209; *Falcke v. Gray* (1859), 4 Drew. 651, at p. 658.

³ 56 & 57 Vict., c. 71.

⁴ Where the article is of no special value or interest the Court will not so direct: *Whiteley v. Hilt*, [1918] 2 K.B. 808, at p. 819; *Cohen v. Roche*, [1927] 1 K.B. 169 (order for delivery of Hepplewhite chairs refused).

Specific
perform-
ance

Supple-
mentary
to common
law

At discre-
tion of
Court Specific performance is a discretionary remedy. It does not follow that specific performance will necessarily be granted because damages are not an adequate compensation. The Court has a choice in the matter, and, although this does not mean that the choice will be exercised in an arbitrary or capricious manner, the Court can consider the general fairness of the transaction and refuse the remedy in circumstances which would not justify a refusal of the common law remedy of damages. Thus it can take into account the fact that the plaintiff has been guilty of undue influence,¹ or of misrepresentation,² or has tried to take advantage of a mistake on the part of the defendant.³ It can even refuse it on the ground that to grant it would cause great hardship to the defendant.⁴ These considerations would, of course, be irrelevant at common law.

Situations
where
specific per-
formance
will be
refused But there are other well-established situations, quite distinct from any sharp practice on the part of the suitor, in which the remedy of specific performance will not be granted, and we must briefly consider these:

(a) *Mutuality*

Want of
mutuality It is generally agreed that, in order that a contract may be specifically enforced, there must be mutuality between the parties.⁵ This means that, at the time of making the contract, there must have been consideration on both sides or promises mutually enforceable by the parties. The Court will not grant specific performance to one party when it could not do so at the suit of the other.⁶ Hence specific performance of a gratuitous promise under seal will not be granted;⁷ nor can an infant enforce a contract by this remedy.⁸ His promise is not enforceable against himself, and though he might bring an action upon it for damages it is a general principle of equity to interpose only where the remedy is mutual.⁹

¹ For 'He who comes to Equity must come with clean hands'. Viz. *supra*, p. 232.

² *Lamare v. Dixon* (1873), L.R. 6 H.L. 414, at p. 428; *supra*, p. 204.

³ *Webster v. Cecil* (1861), 30 Beav. 62; *supra*, p. 267.

⁴ *Malins v. Freeman* (1837), 2 Keen 25; *Pegler v. White* (1864), 33 Beav. 403; *supra*, p. 268.

⁵ Cf. Ames, *Lectures on Legal History* (1913), p. 370.

⁶ Snell's *Principles of Equity* (24th ed.), p. 544.

⁷ *Jefferys v. Jefferys* (1841), Cr. & Ph. 138.

⁸ *Flight v. Bolland* (1828), 4 Russ. 298; *supra*, p. 171.

⁹ Cf., however, the case of contracts unenforceable for failure of a written note or memorandum as required by the Statute of Frauds.

(b) *Contracts of personal service*

The Court will not compel the performance of contracts of personal service, nor of those which require the use of personal skill. Contracts of personal service

This exception seems to be based on the grounds of public policy: that it would be improper to make one man serve another against his will. The cases in which it has been applied all relate to contracts similar to those of master and servant, for example, of a singer hired to sing¹ or of apprenticeship.²

(c) *Contracts requiring supervision*

Where the Court would be required to supervise the execution of the contract, specific performance will not be granted. Contracts requiring constant supervision

If the Court endeavoured to enforce a contract, for example, for repair, or a contract for the supply of goods to be delivered by instalments, it is plain that 'it would require a series of orders, and a general superintendence, which could not conveniently be undertaken by any Court of justice'.³ Thus in *Ryan v. Mutual Tontine Westminster Chambers Association*:⁴

The defendants leased to the plaintiff a flat in a block of buildings and covenanted in the lease to maintain in constant attendance a resident porter for the benefit of the tenants. They appointed as porter one Benton who was by avocation a cook, and who was acting as *chef* in a City restaurant. Benton rarely acted as porter in person, but left as his deputies his wife, relations, charwomen, small boys etc. The plaintiff brought an action against the defendants claiming *inter alia* specific performance of the covenant which had not, so he alleged, been performed.

The Court held that it could not grant specific performance of the covenant as it was a contract which would require such supervision as the Court was not prepared to undertake. Specific performance will only be granted where the contract can be performed, so to speak, *uno flatu*, and in the terms specifically agreed upon.

In addition to these instances, the Court will also refuse ^{and} specific performance where the interest to be transferred is merely transitory,⁵ or where the contract is specifically

¹ *Lumley v. Wagner* (1852), 1 De G.M. & G. 604; *infra*, p. 487.

² *De Francesco v. Barnum* (1889), 45 Ch. D. 430; *supra*, p. 184.

³ *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Co.* (1873), L.R. 16 Eq. 433, *per* Lord Selborne L.C. at p. 439. Cf. building contracts: Fry, *Specific Performance* (6th ed.), p. 48.

⁴ [1893] 1 Ch. 116.

⁵ *Lavery v. Pursell* (1888), 39 Ch. D. 508, at p. 519 (tenancy for a year).

enforceable in part only.¹ Also contracts to appoint an arbitrator,² to convey the goodwill of a business without the business itself,³ and to exercise a testamentary power of appointment⁴ will not be specifically enforced.

Injunction

Injunction An injunction may be used as a means of enforcing an express negative stipulation in a contract, or a simple covenant or promise to forbear.

to enforce a negative stipulation Although the grant of an injunction is normally discretionary, it does not seem that the Court has any discretion to refuse the grant of an injunction to restrain the breach of a negative contract.⁵ A negative contract is one whereby a promisor covenants not to do something, for example, not to carry on a certain trade⁶ or not to ring church bells early in the morning;⁷ or one which is negative in substance although not in form, for example, to buy beer exclusively from a certain brewer, the injunction being granted to restrain the covenantor from buying beer elsewhere.⁸

even where specific performance refused An injunction may be granted to restrain the breach of a negative stipulation in a contract even though the Court would not order specific performance of the positive stipulations contained in the same contract.⁹ Also it may be used in a case where to enforce performance of the contract would involve a general superintendence such as the Court could not undertake. Thus in *Metropolitan Electric Supply Co., Ltd. v. Ginder*,¹⁰ an express promise by the defendant to take the whole of his supply of electricity from the Company was held to import a negative promise that he would take none from elsewhere, and an injunction was accordingly granted.

Contracts of personal service cannot, of course, be specifically enforced, but it is possible by means of an injunction to en-

¹ *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116.

² *Re Smith & Service, and Nelson & Sons* (1890), 25 Q.B.D. 545.

³ *Baxter v. Conolly* (1820), 1 J. & W. 576.

⁴ *Re Parkin*, [1892] 3 Ch. 510.

⁵ *Doherty v. Allman* (1878), 3 App. Cas. 709, at p. 720. Cf. *Warner Bros. Pictures, Incorporated v. Nelson*, [1937] 1 K.B. 209, at p. 217.

⁶ *Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Co., Ltd.*, [1894] A.C. 535.

⁷ *Martin v. Nislin* (1724), 2 Peere Wms. 266.

⁸ *Catt v. Tourle* (1869), L.R. 4 Ch. App. 654.

⁹ *Lumley v. Wagner* (1852), 1 De G.M. & G. 604.

¹⁰ [1901] 2 Ch. 799.

courage performance in an oblique manner. In *Lumley v. Wagner*,¹ for instance: *Lumley v. Wagner*

The defendant agreed to sing at the plaintiff's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre, and refused to perform her contract with the plaintiff.

The Court refused to order specific performance of her positive engagement to sing at the plaintiff's theatre, but granted an injunction to restrain the breach of her promise not to sing elsewhere.

The scope of the principle in *Lumley v. Wagner* has, however, been confined by two restrictions: Restricted effect

In the first place, although it has been argued that an express positive promise implies a negative undertaking not to do anything which would interfere with the performance of this promise, the Courts have refused in contracts of personal service to enforce by injunction anything but an express stipulation not to do some specific thing. There must have been inserted in the contract itself an express negative stipulation, and the defendant must have acted in breach of that stipulation. Thus in *Whitwood Chemical Co. v. Hardman*,² a manager was employed by a company and agreed 'to give the whole of his time to the company's business'; afterwards he gave some of his time to a rival company. In terms, the contract contained no negative covenant, and so the Court held that an injunction could not be granted. This principle will be acted upon where a stipulation, although couched in a negative form, is, in reality, positive in substance. Thus where an employer agreed with his manager that he would not require him to leave the employment except under certain circumstances, it was held that such an undertaking could not be enforced by an injunction because it was merely a promise by the employer that he would retain him in his employment.³ (i) need for express negative stipulation

Secondly, an injunction will not be granted if its effect will be to compel the defendant to fulfil his contract or to abstain from any business whatsoever, for this would be to compel him to choose between specific performance and starvation. In *Ehrman v. Bartholomew*,⁴ therefore, where a traveller promised that he would serve a firm for ten years and would not, during that period, 'engage or employ himself in any other business', (ii) cannot be used to enforce specific performance

¹ (1852), 1 De G.M. & G. 604.

³ *Davis v. Foreman*, [1894] 3 Ch. 654.

² [1891] 2 Ch. 416.

⁴ [1898] 1 Ch. 671.

an injunction was refused, among other grounds, because to have granted it would have given him no real choice but to work for the firm. But if the employment is of a special kind, an injunction may be granted to restrain the defendant from doing similar work of that kind. So in *Warner Brothers Pictures, Incorporated v. Nelson*:¹

A film actress, Mrs. Nelson (professionally known as Bette Davis), agreed that she would render her exclusive services to the plaintiffs for a certain period, and would not during that period render any similar services to any other person. In breach of these stipulations, she entered into an agreement to appear for another film company. The plaintiffs claimed an injunction to restrain her.

Branson J. held that the injunction should be granted on the terms that she should not act as a film artiste in this country for any other person. There were other spheres of activity which, if not so remunerative, would still be open to her, so that she would not be driven, although she might be tempted, to perform the contract:

The conclusion to be drawn from the authorities is that where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the Court will enforce those negative covenants.²

IV. EXTINCTION OR DISCHARGE OF A RIGHT OF ACTION ARISING FROM BREACH OF CONTRACT

The right of action arising from a breach of contract may be extinguished or discharged in one of three ways:

- (i) By the consent of the parties;
- (ii) By the judgment of a Court of competent jurisdiction;
- (iii) By lapse of time.

Discharge by Consent of the Parties

By consent This may take place either by release, or by accord and satisfaction; and the distinction between these two modes of discharge brings us back to the elementary rule of contract, that a promise made without consideration must, in order to be binding, be under seal.

¹ [1937] 1 K.B. 209.

² At p. 217.

A release is a waiver, by the person entitled, of a right of Release action, accruing to him from a breach of a promise made to him. Such a waiver, then, should be under seal; otherwise it will be nothing more than a promise, given without consideration, to forbear from the exercise of a right.

Accord and satisfaction is an agreement, not necessarily Accord and satisfaction under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. We have already seen¹ that satisfaction is the consideration which makes the accord operative, and that it may now be executed or executory.²

Bills of exchange and promissory notes form an exception to Bills of exchange these two methods of discharge.³ These instruments, it will be remembered, admit of a parol or gratuitous waiver before they become due, provided that such a waiver is made in writing, or the instrument delivered up to the acceptor; and one who has a right of action arising upon a bill or note can discharge it in the same way.

Discharge by the Judgment of a Court of Competent Jurisdiction

The judgment of a Court of competent jurisdiction in the By judgment plaintiff's favour discharges the right of action arising from breach of contract. The right is thereby merged in the more solemn form of obligation called a Contract of Record.

The result of legal proceedings taken upon a broken contract may be summarized as follows:

The bringing of an action has not itself any effect in Effect of bringing action discharging the right to bring the action. Another action may be brought for the same cause in another Court, although proceedings in such an action would, if they were merely vexatious, be stayed upon application to the summary jurisdiction of the Courts.⁴ But when judgment is given in an action, whether by and of judgment consent⁵ or by decision of the Court,⁶ the obligation is discharged by estoppel.⁷ The plaintiff is estopped from bringing another action for the same cause as long as the judgment

¹ *Supra*, p. 395, subject to the rule of estoppel there cited.

² *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616, at p. 643.

³ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61) s. 62; *supra*, p. 397.

⁴ R.S.C., Order xxv, r. 4.

⁵ *In re South American and Mexican Co.*, [1895] 1 Ch. 37.

⁶ *Conquer v. Boot*, [1928] 2 K.B. 336.

⁷ See Odgers, *Pleading and Practice* (15th ed.), p. 204. Such an estoppel must be specially pleaded.

stands.¹ The judgment given may be reversed on appeal and entered in his favour, or the parties may be remitted to their original positions by a new trial of the case being ordered by the Court of Appeal.

But such an estoppel can only result from an adverse judgment if it has proceeded upon the merits or substance of the case. If a man fails because he has sued in the wrong character, as executor instead of administrator; or at a wrong time, as where action is brought before a condition of the contract is fulfilled, such as the expiration of a period of credit in the sale of goods, a judgment proceeding on these grounds will not prevent him from succeeding in a subsequent action.²

It remains to say that the obligation arising from judgment may be discharged if the judgment debt is paid, or satisfaction obtained by the creditor from the property of his debtor by the process of execution.³

Extinction by Lapse of Time

By lapse of
time

At common law, lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it is limited in point of duration. Yet although the right possesses this permanent character, the remedies arising from its violation are withdrawn after a certain period of time, for *interest reipublicae ut sit finis litium*. The remedies are barred, though the right is not extinguished.

This may come about in one of two ways: by the application of the Limitation Act, 1939,⁴ and by the equitable doctrine of laches.

(a) *Limitation Act, 1939*

Limitation
Act, 1939

The law on this subject of the limitation of actions was at one time in a very confused state. It had to be sought in a number of statutes and judicial decisions which had resulted in a welter of illogical distinctions. Happily the Limitation Act, 1939, has greatly simplified the law.

The Act provides that an action founded on a simple contract must be commenced within six years, and one on a specialty

¹ An estoppel will not, however, bind if judgment has been obtained, e.g. by fraud: *Duchess of Kingston's Case* (1776), 20 St. Tr. 537.

² *Palmer v. Temple* (1859), 9 A. & E. 508.

³ 4 & 5 Anne, c. 16, s. 12.

⁴ 2 & 3 Geo. VI, c. 21.

within twelve years, from the date on which the cause of action accrued.¹

If, however, on that date the person to whom the right of action accrues is under a disability, the action may be brought within six (or twelve) years from the date when the person ceases to be under the disability, or dies.² This enlargement of time does not apply when the disability supervenes after the right of action has already accrued, or where the same person is afflicted by successive disabilities (e.g. infancy followed by insanity) separated by an interval in which he is under no disability. Again, no extension is allowed when the right of action first accrues to a person not under a disability through whom the person under a disability claims. The disabilities mentioned in the Act are infancy, unsoundness of mind, and penal servitude.³

When an action is based on the fraud of the defendant, or when the existence of the right of action has been concealed by his fraud, or when an action is for the relief from the consequences of a mistake, the period does not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it.⁴

The Act operates merely to bar the contractual remedy, but not to extinguish the right. It is procedural and not substantive. If, therefore, a debtor owes to his creditor certain debts some of which are, and some of which are not, statute-barred, the creditor is entitled to appropriate any payment made by the debtor to those debts which are statute-barred, unless the debtor at the time expressly indicates that he is discharging a debt which is still actionable.⁵ Also, the remedy may in certain circumstances be revived, even though the limitation period has already expired. The Act provides:⁶

Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, . . . and the person liable or accountable therefor acknowledges the claim or makes any payment in respect

¹ S. 2. But in the case of personal injuries arising from a breach of contract, the Law Reform (Limitation of Actions) Act, 1954 (2 & 3 Eliz. II, c. 36), s. 2 (1) provides that the limitation period is to be three years.

² S. 22.

³ S. 31 (2). But disability and forfeiture for penal servitude for felony, imposed by the Forfeiture Act, 1870 (33 & 34 Vict., c. 23) s. 8, have now been abolished by the Criminal Justice Act, 1948 (11 & 12 Geo. VI, c. 58), s. 70 (1).

⁴ S. 26. But this provision is not to affect the rights of third parties taking *bona fide* and for value.

⁵ *Mills v. Fowkes* (1839), 5 Bing. N.C. 455.

⁶ S. 23 (4).

thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or last payment.

Thus where *A* owes *B* the sum of £50 on a simple contract, *B*'s remedy is barred after the passing of six years from the date on which he was entitled to claim the money. But if *A*, whether during or after the limitation period, acknowledges the debt, time begins to run afresh from the date of the acknowledgement. The acknowledgement must be in writing and signed by the person making it or his agent, and either an acknowledgement or part payment must be made to the person or to the agent of the person whose claim is acknowledged or in respect of whose claim the payment is made.¹

(b) *Laches*

Laches : The periods of limitation prescribed in the Act do not apply to claims for specific performance or an injunction or other equitable relief, except in so far as the Court, applying the equitable doctrine of laches, may do so by analogy.² The discretionary character of these remedies would be impaired by the automatic application to them of fixed periods, and in the doctrine of laches, equity has developed a doctrine which is more appropriate to them.

Equity has always refused its aid to stale claims: *vigilantibus non dormientibus jura subveniunt*. Delay which is sufficient to deprive a person of his right to claim specific performance or injunction is known technically as 'laches'.³ This doctrine has been described in a well-known passage in the advice of the Privy Council in *Lindsay Petroleum Co. v. Hurd*,⁴ as follows:

The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval.

¹ S. 24 (1) and (2).

² S. 2 (7).

³ Snell's *Principles of Equity* (24th ed.), p. 26.

⁴ (1874), L.R. 5 P.C. 221, per Sir Barnes Peacock at p. 239.

In some cases, equity acts on the analogy of the Statute. If the equitable claim is analogous to a claim which is expressly provided for by the Act, for example, a claim for an account, equity will apply the statutory period by analogy. On the other hand, in the case of purely equitable claims, such as a claim for rescission,¹ or for specific performance,² or for an injunction,³ equity will apply its own principles. The plaintiff must show himself to be 'ready, willing, and eager' to assert his rights, and even a short lapse of time may, in certain circumstances,⁴ be fatal.

¹ *Allcard v. Skinner* (1887), 36 Ch. D. 145; *supra*, p. 239.

² *Mills v. Haywood* (1877), 6 Ch. D. 196.

³ *Great Western Railway v. Oxford, Worcester and Wolverhampton Railway* (1853), 3 De G.M. & G. 341.

⁴ e.g. in the case of the sale of goods: *Oscar Chess, Ltd. v. Williams*, [1957] 1 W.L.R. 370; *Long v. Lloyd*, [1958] 1 W.L.R. 753.

PART VI

AGENCY

**CHAPTER XVIII. THE MODE IN WHICH THE
RELATIONSHIP OF PRINCIPAL AND AGENT
IS CREATED**

**CHAPTER XIX. EFFECT OF THE RELATIONSHIP OF
PRINCIPAL AND AGENT**

**CHAPTER XX. DETERMINATION OF AGENT'S
AUTHORITY**

therefore be no implication that the defendant should keep his colliery so that they might earn their commission.

On the other hand, in *Turner v. Goldsmith*:¹

The defendant, a shirt manufacturer, agreed to employ the plaintiff as his agent, canvasser, and traveller for five years. The plaintiff was to do his utmost to obtain orders for, and sell, such various goods *manufactured and sold* by the defendant as should from time to time be forwarded or submitted by sample to him. Within the period of five years the factory was burnt down and the defendant did not resume business. The plaintiff ceased to be employed, and brought an action for breach.

The Court of Appeal gave judgment in his favour. They implied a term that he was to be allowed to earn his commission. *Rhodes v. Forwood* was thus distinguished:²

... that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him.

Moreover, the Court held that the contract had not been frustrated by the fire, for the plaintiff's employment was not confined to articles manufactured by the defendant, but extended also to articles sold by him without reference to their origin.

If the principal entrusts property to the agent for sale on a commission, this is not normally such an 'employment' as will raise the implication.³ This is clear from certain cases concerning house agents. A house agent is generally entitled only to be paid a commission upon completion of the purchase, or, if the agreement so provides, upon introducing a client willing and able to purchase. The Courts have consistently refused to imply a term that a person who employs a house agent should do nothing to prevent the sale. So, for example, he is not bound to complete,⁴ and he may sell the property elsewhere,⁵ or simply refuse to sell at all.⁶

The principal must also reimburse the agent for all expenses, and indemnify him against all liabilities and claims, which the agent has reasonably incurred in the execution of his duties.⁷

Reimbursement and indemnity

¹ [1891] 1 Q.B. 544; *Warren & Co. v. Agden* (1922), 38 T.L.R. 388.

² *Per* Lindley L.J. at p. 549.

³ *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] A.C. 108.

⁴ *Boots v. Christopher (E.) & Co.*, [1952] 1 K.B. 89.

⁵ *McCallum v. Hicks*, [1950] 2 K.B. 271.

⁶ *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] A.C. 108.

⁷ *Adamson v. Jarvis* (1827), 4 Bing. 66.

These rights of reimbursement and indemnity extend to cases where the agent has occasioned liability by an honest mistake,¹ but not where they have arisen from his breach of duty or default.²

Lien and
right of
stoppage
in transitu

The agent is also entitled to a lien on the goods of his principal in his possession in respect of any claim by him against his principal arising out of the agency.³ Where he has bought goods for his principal, he has, in addition, a right of stoppage *in transitu* (similar to that of an unpaid seller)⁴ in respect of the money which he has paid or is liable to pay.

II. THE RELATIONS BETWEEN THE PRINCIPAL AND THIRD PARTIES

*Qui facit
per alium,
facit per se*

When a principal gives to an agent express authority to contract on his behalf, he is bound, as regards third parties, by all acts of the agent which are done within the limits of that authority. This rule is often expressed in the maxim, *Qui facit per alium, facit per se*.

Even in
cases
where only
ostensible
authority

The same rule applies where the agent, though contracting outside his express authority, contracts within an authority which he may be reasonably supposed to possess. We have already seen that the inference that authority has been conferred by one person on another may arise from conduct, and this involves as a consequence that a principal cannot by private communications with his agent limit any authority which he has allowed his agent to assume:

There are two cases in which a principal becomes liable for the acts of his agent, one, where the agent acts within the limits of his authority, the other, where he transgresses the actual limits, but acts within the apparent limits of his authority, where those apparent limits have been sanctioned by the principal.⁵

Two cases may be cited in illustration. In *Edmunds v. Bushell and Jones*:⁶

Jones employed Bushell as a manager of his business, and it was incidental to the business that bills should be drawn and accepted from

¹ *Pettman v. Keble* (1850), 9 C.B. 701.

² *Lewis v. Samuel* (1846), 8 Q.B. 685.

³ *Williams v. Millington* (1788), 1 H. Bl. 81.

⁴ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), ss. 44-46.

⁵ *Maddick v. Marshall* (1864), 16 C.B., N.S. 387, per Byles J. at p. 393.

⁶ (1865), L.R. 1 Q.B. 97.

time to time by the manager. Jones, however, forbade Bushell to draw and accept bills. Bushell accepted some bills in breach of this prohibition, and Jones was sued upon them.

He was held liable. 'If a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority.'¹ And in *Howard v. Sheward*:²

The defendant, a horse-dealer, employed his brother to sell a horse to the plaintiff, expressly instructing him not to warrant the horse. The brother nevertheless gave a warranty, and, the horse being in fact unsound, the plaintiff sued the defendant for its breach.

The Court said that, although the servant of a private individual entrusted on one occasion to sell a horse could not bind his master by a warranty given without authority, the agent of a horse-dealer had 'an ostensible authority, which could not be negatived by shewing a secret understanding between the horse-dealer and his servant that the latter was not to warrant'.³

Different Kinds of Agents

We may note here the authority with which certain kinds of agents are invested in the ordinary course of their employment. Types of agent

(a) *Auctioneers*

An auctioneer is an agent to sell property at a public auction. He is primarily an agent for the seller, but, upon the property being knocked down, he becomes also the agent of the buyer, but only for the purpose of signing a memorandum sufficient to satisfy section 40 (1) of the Law of Property Act, 1925.⁴ He has not only authority to sell, but actual possession of the property to be sold, so that he has a lien on the goods for his charges. He may also sue the purchaser in his own name. Auctioneers

The principal will be bound if the auctioneer acts within his apparent authority, even though he disobeys instructions privately given. So, if an auctioneer through inadvertence, and contrary to instructions, puts up an article for sale without reserve, his principal will be bound by the sale.⁵ But where there is a sale by auction with *notice* that it is subject to a reserve,

¹ At p. 99.

² (1866), L.R. 2 C.P. 148.

³ At p. 151.

⁴ 15 & 16 Geo. V, c. 20. See *Chaney v. Macleod*, [1929] 1 Ch. 461 and viz. *supra*, p. 69.

⁵ *Rainbow v. Howkins*, [1904] 2 K.B. 322, at p. 326.

the auctioneer cannot reasonably be supposed to have authority to accept a bid at less than the reserve fixed, and so cannot bind his principal by doing so.¹

(b) *Factors*

Factors A factor, by the rules of common law and of mercantile usage, is an agent to whom goods are consigned for the purpose of sale.

He has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer. He further has a lien on the goods for the balance of account as between himself and his principal, and an insurable interest in them. Such is the authority of a factor at common law, an authority which the principal cannot restrict as against third parties by instructions privately given to his agent.²

Factors Act, 1889 This presumed authority has been extended by a series of Factors Acts which were consolidated by the Factors Act, 1889.³ The Act applies not only to factors, but also to any mercantile agent 'having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'.⁴ He is deemed also to have power to pledge the goods, and section 2 of the Act in effect provides that where he is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, is as valid as if it were expressly authorized by the owner of goods.

Persons, therefore, who, in good faith, take the goods under such a disposition, and who have not at the time notice that the agent has not the authority to dispose of them, acquire a good title to them. And so long as the agent is left in possession of the goods,⁵ revocation of authority by the principal cannot prejudice the rights of such persons to them.

Sellers and buyers of goods Moreover, under sections 8 and 9 of this Act, and section 25 of the Sale of Goods Act, 1893, a person who, having sold

¹ *McManus v. Fortescue*, [1907] 2 K.B. 1, at p. 6.

² *Pickering v. Bush* (1812), 15 East. 38; *supra*, p. 502.

³ 52 & 53 Vict., c. 45.

⁴ S. 1 (1).

⁵ Provided that the possession is in the capacity of mercantile agent, and not, for example, of hirer.

goods, continues or is in possession of the goods or the documents of title to them, and a person who, having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to them, is placed in the same position as a 'mercantile agent' in this respect.

(c) *Brokers*

A broker is an agent primarily employed to negotiate a ^{Brokers} contract between two parties.¹ Where he is a broker for sale, he has not possession of the goods to be sold, and so he has not the authority which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him.

(d) '*Del credere*' agents

A *del credere* agent is an agent employed for the purpose of sale, but who, in return for extra remuneration, also becomes ^{Del credere agents} responsible to his principal for payment by the buyer. He undertakes that the parties with whom his principal is brought into contractual relations will pay the money which may become due under the contract into which they enter.² He does not, however, become responsible to the buyer for the due performance of the contract by his principal.

Limitations on the Principal's Rights and Liabilities

There are certain situations in which, although the agent contracts within his authority, express or implied, the principal acquires no rights or liabilities under the contract. ^{Limits on principal's capacity to sue and be sued}

If an agent makes himself a party to a deed on behalf of another, his principal cannot sue or be sued on the deed.³ This arises from the formal character of the contract and from the technical rule that those only can sue or be sued upon an ^{(i) Agent party to deed}

¹ A broker should be distinguished from a commission agent. A commission agent is employed not to establish privity of contract between his principal and third parties, but to sell or buy goods for the principal at the most favourable price available. He receives a commission or reward for his exertions, but the purchase or sale is made with the third party by him alone. See *Armstrong v. Stokes* (1872), L.R. 7 Q.B. 598.

² Although the agent clearly promises 'to answer for the default of another', no note or memorandum in writing is necessary to satisfy the requirements of the Statute of Frauds, 1677 (29 Car. II, c. 3), for the undertaking is only one incident in a larger contract. *Viz. supra*, p. 68, and see *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, at pp. 784, 786.

³ *Schack v. Anshony* (1813), 1 M. & S. 573.

indenture who are named or described in it as parties. Exceptions, however, exist in the cases of powers of attorney,¹ and contracts into which the agent enters as trustee for the principal.²

(ii) Foreign principal Secondly, it is said that a foreign principal cannot sue or be sued on a contract entered into on his behalf, the agent only being liable on the contract.³ But it is doubtful whether this rule still exists.⁴ At the most there may be a presumption that this is so,⁵ and, in modern commercial conditions, it can be rebutted without much difficulty.

(iii) Bills of exchange Thirdly, a principal is not liable upon any bill of exchange or negotiable instrument unless his name appears thereon;⁶ but if it is written there, even in the hand of the agent, he will be liable.

(iv) Undisclosed principal Finally, certain limitations are imposed upon the principal's rights and liabilities where the fact of the agency is not disclosed to the other party at the time that the contract is made. Normally, where an agent acts on behalf of a principal whose existence he does not, at the time, disclose, the principal can, when discovered, sue and be sued under the contract. This doctrine of the 'undisclosed principal' is peculiar to English law,⁷ and has sometimes been criticized as an anomaly⁸ since it runs counter to the generally accepted principles of privity of contract. But it would seem to serve a useful commercial purpose,⁹ and is further subject to the qualification that the authority must have been in existence at the time the contract was made.¹⁰ As we have seen, it is not possible to ratify a contract unless the principal is named therein, or is at any rate identifiable. Otherwise it would be open to any stranger to intervene and sue.

¹ Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), s. 123.

² *Harmer v. Armstrong*, [1934] Ch. 65.

³ *Hutton v. Bulloch* (1874), L.R. 9 Q.B. 572 (commission agent).

⁴ *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.*, [1917] 2 K.B. 141, *per* Bray J. at pp. 162, 163; Powell, *Law of Agency*, p. 207. Cf. Hudson (1957), 35 Can. Bar Rev. 336.

⁵ *Rusholme & Bolton & Roberts Hadfield, Ltd. v. S. G. Read & Co. (London), Ltd.*, [1955] 1 W.L.R. 146.

⁶ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 23.

⁷ In continental systems the absence of the doctrine of privity of contract makes such a principle commercially unnecessary. Cf. Müller-Freienfels (1953), 16 Mod. L.R. 299.

⁸ Pollock (1888), 3 L.Q.R. 359; Ames, *Lectures on Legal History*, p. 453.

⁹ Müller-Freienfels (1953), 16 Mod.L.R. 299.

¹⁰ *Keighley, Maxted & Co. v. Durant*, [1901] A.C. 240; *supra*, p. 499.

But the right of the undisclosed principal to intervene as a contracting party is subject to certain limitations.¹

Limits of
inter-
vention

First, intervention is excluded if the agent has contracted in terms which import that he is the real and only principal, for then the idea of agency is incompatible with the terms of the contract. Thus where an agent in making a charter-party described himself therein as 'owner' of the ship, it was held that evidence was not admissible to prove that another person was the real owner and that he was merely acting as agent on his behalf. His principal could not intervene, nor, by parity of reasoning, could he be sued.² On the other hand, where the agent merely described himself as 'charterer', evidence was admitted to show who the real principal was, and he was allowed to intervene and sue on the charter.³ 'Charterer' is an equivocal description, and so, it has been held, is 'landlord'⁴ and 'tenant';⁵ but 'owner' is not.

Agent
must not
have con-
tracted as
principal

Secondly, where a contract is made in which the personality of the contracting party is of a sufficient importance to be regarded as a term of the contract, no other person can interpose and adopt the contract. For example, in the case of an agreement to write a book,⁶ or to underwrite shares in a company,⁷ or to purchase goods subject to a right of set-off,⁸ if the agent contracts in his own name without disclosure of his agency, his principal cannot intervene. Of course, if the promisor subsequently discovers the identity of the principal, and with an opportunity of affirming or rejecting the contract, elects to affirm it, as, for example, by retaining goods purchased, he will be bound.⁹ But not otherwise.¹⁰

Personality
of agent
must not
be term of
contract

In any case, a person who contracts with an agent, honestly and reasonably believing him to be the principal party to the transaction, is entitled to set up against the principal, when discovered, any set-off which is available to him against the

set-off

¹ See Goodhart and Hamson (1932), 4 Camb. L.J. 320.

² *Humble v. Hunter* (1848), 12 Q.B. 310.

³ *Drughorn (Fred.), Ltd. v. Rederiaktiebolaget Transatlantic*, [1919] A.C. 203.

⁴ *Epps v. Rothnie*, [1945] K.B. 562.

Danziger v. Thompson, [1944] K.B. 654.

⁶ *Boulton v. Jones* (1857), 2 H. & N. 564, per Bramwell B. at p. 566.

⁷ *Collins v. Associated Greyhound Racecourses, Ltd.*, [1930] 1 Ch. 1.

⁸ *Boulton v. Jones* (1857), 2 H. & N. 564, *supra*, p. 259; *Said v. Butts*,

[1920] 3 K.B. 497; *Greer v. Downs Supply Co.*, [1927] 2 K.B. 28.

⁹ *Benjamin on Sale* (8th ed.), p. 106; *Greer v. Downs Supply Co.*, [1927]

2 K.B. 28, at p. 33.

¹⁰ *Boulton v. Jones* (1857), 27 L.J. Ex. 117, at p. 119.

agent, and which accrued while he still supposed that he was dealing with the agent as principal.¹ This rule rests upon the doctrine of estoppel, for:

It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.²

But a person who has not been misled cannot claim this right. So in a case where a man dealt with brokers whom he knew to be in the habit of selling, sometimes as brokers for principals, and sometimes on their own account, he could not set off his indebtedness to the brokers against his debt to the principal.³

Election
on dis-
covery

Upon discovering the principal, the other contracting party may elect to sue either the agent or the principal. Any act which unequivocally indicates the adoption of either principal or agent as the party liable to him determines his election, and he cannot afterwards sue the other.⁴

Misrepresentation or Non-disclosure by Agent

Misrep-
resentation
of agent a
ground for
rescission

When a contract is made through an agent, a misrepresentation by him, or, if the contract is one *uberrimae fidei*, his failure to disclose a material fact, renders the contract voidable by the other party just as would misrepresentation or non-disclosure on the part of the principal himself. The other contracting party may rescind the agreement, or set up the misrepresentation as a defence to an action against him for specific performance or otherwise. So far as concerns the invalidation of the contract, it makes no difference whether the misrepresentation was made fraudulently or innocently. That distinction only becomes important when the question relates to the liability of the principal in damages for the tort of deceit.

Liability of
principal in
deceit

A principal will be liable in deceit if he expressly authorizes his agent to make a statement which he knows to be false, or if he deliberately employs an agent in order that false statements may be made.⁵ So, for example, if a landlord knows of facts which would deter a prospective tenant from taking a lease of his house, and employs an agent in order that it might be

¹ *Isberg v. Bowden* (1853), 8 Ex. 852, *per* Martin B. at p. 859.

² *Cooke v. Eshelby* (1887), 12 App. Cas. 271, *per* Lord Watson at p. 278.

³ *Cooke v. Eshelby* (1887), 12 App. Cas. 271.

⁴ *Scarf v. Jardine* (1882), 7 App. Cas. 345.

⁵ *Armstrong v. Strain*, [1952] 1 K.B. 232.

innocently represented to be sound, he will be liable to an action for damages for fraud.¹ A principal is also responsible for fraudulent misrepresentations made by the agent in the course of his employment under the normal rules of vicarious liability.²

One of the most difficult problems, however, is to know how far the knowledge of the agent that the representation is false can be attributed to the principal. In general it is true to say that where the state of mind of a party to a contract is material, the law regards the principal and agent as one.³ Thus in a contract *uberrimae fidei*, if there is a failure to disclose material facts which are known to the agent but not to the principal, or *vice versa*, the contract may be avoided.⁴ But this formula is correct only 'where the employment of the agent is such that in respect of the particular matter in question, he really does represent the principal'.⁵ So, if, for example, the agent of an insurance company assists the proposer by filling in the proposal form for him, and does so in such a way as to mislead the company, the policy is voidable by the company. No knowledge of the inaccuracies will be attributed to the company, for the agent is not employed by them to fill in proposal forms; but knowledge will be attributed to the proposer, for the company's agent became his agent for the matter in question.⁶

Also in *Blackburn, Low & Co. v. Vigors*:⁷

A principal effected a policy of insurance on a ship through a broker, X, neither of them being aware of any material fact not disclosed to the insurers. The principal had, however, previously employed another broker, Y, to negotiate a policy on the same ship, and Y had accidentally, and before effecting the insurance, learnt of a material fact which he had not disclosed to his principal. The principal sued on the policy of insurance effected by X, but the insurers disclaimed liability on the ground that Y's knowledge ought to be imputed to the principal, and that this knowledge would vitiate the policy effected by the innocent X.

The House of Lords refused to accept this defence, holding that no knowledge could be imputed because Y's agency had been determined before the policy sued on had been effected.

¹ *Ludgater v. Love* (1881), 44 L.T. 694.

² *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716.

³ *Pearson (S.) & Son, Ltd. v. Dublin Corporation*, [1907] A.C. 351 (principal believes to be true, but agent knows to be false).

⁴ *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531.

⁵ *Ibid.*, per Lord Halsbury at p. 538.

⁶ *Newsholme v. Road Transport and General Insurance Co.*, [1929] 2 K.B. 356.

⁷ (1887), 12 App. Cas. 531.

No deceit where 'innocent division of ingredients' But even where the knowledge of the principal and agent can be treated as one, in order for an action in *deceit* to lie, it must be shown that one of the two was dishonest. If, upon examination, the facts resolve themselves into an 'innocent division of ingredients',¹ no liability will be imposed. An innocent state of mind on the part of the agent cannot be added to an innocent state of mind on the part of the principal so as to produce fraud. This is clearly shown by *Armstrong v. Strain*:²

The defendant employed a firm of estate agents to sell his bungalow for him. One Skinner, a member of the firm, represented to the plaintiffs that 'any building society would lend £1,200 on it', that is, that it was a property of considerable value. In fact, this was quite untrue as the bungalow had been underpinned several times in order to prevent it from falling down. The defendant knew that the bungalow was in poor condition, but he did not authorise Skinner to make the representation, nor did he deliberately employ him with that end in view. Skinner himself had no knowledge of the underpinning. The plaintiffs brought an action for damages for fraud.

The action failed. The trial judge, Devlin J.,³ found that there was no fraud intended either by the defendant or by his agent. Although the defendant knew facts which falsified the agent's representation, this did not make him guilty of deceit. The intentions of both principal and agent were quite innocent, and it was not possible to put them together to produce fraud. This decision was upheld by the Court of Appeal.

Settlement with Agent

Does payment to agent discharge debt? It often happens that either the principal or the third party incurs a debt to the other under a contract made through an agent. The principal or the third party thereupon settles with the agent, intending that he should pay across the money and so discharge the debt. Sometimes, however, the agent fails to do so, and makes away with the money or becomes bankrupt. Is the debtor then liable to pay over again? The answer will depend on whether it is the principal or the third party who is making the payment.

¹ Sir Patrick Devlin (1937), 53 L.Q.R. 344; *Armstrong v. Strain*, [1951] 1 T.L.R. 856, *per* Devlin J. at p. 871.

² [1952] 1 K.B. 232; *Cornfoot v. Fowke* (1840), 6 M. & W. 358; *Gordon Hill Trust v. Segall*, [1941] 2 All E.R. 379. Cf. *London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd.*, [1936] 2 All E.R. 1039 which now, however, may be considered to have been wrongly decided.

³ [1951] 1 T.L.R. 856.

If it is the principal, the general rule is that he is not discharged by payment to the agent.¹ But where the third party elects to look to the agent for payment and in consequence the principal settles with the agent,² or where the third party by his conduct leads the principal to suppose that the debt has already been paid,³ the third party is estopped from claiming to be paid over again. Normally, however, this is not the case. So in *Irvine & Co. v. Watson & Sons*:⁴

The defendants employed C. & Co. as agents and brokers to buy palm oil for them. C. & Co. purchased the oil from the plaintiffs, revealing at the time of sale that they were buying for principals, but not stating the name of the principals. The terms of the sale were 'Cash on or before delivery'. It was not infrequent in the oil trade to require payment of a portion of the price before delivery, but it was not invariable, and in the present case no such demand was made. The oil was delivered, and, on delivery, the defendants paid the price to the brokers, not knowing that they had not paid the plaintiffs. C. & Co. stopped payment, and the plaintiffs sued the defendants for the price.

It was held that the defendants were liable. The plaintiffs knew that the brokers were contracting not on their own account but on behalf of principals, so that they did not look exclusively to the brokers for payment. Moreover, there was no conduct on their part which would preclude them from suing for the price. It was not an invariable custom of the trade to insist on prepayment, and failure to do so would not therefore induce in the defendants a reasonable belief that payment had already been made.

A difficulty, however, arises in the case of an undisclosed principal. If an undisclosed principal pays the agent for the price of goods sold to him, there is authority for saying that he cannot be sued when he is discovered by the purchaser. The reason is that, since the third party did not know of his existence, he must be presumed to have extended credit exclusively to the agent. In *Armstrong v. Stokes*:⁵

The defendants employed Messrs. Ryder, a firm of commission merchants, who carried on business sometimes for themselves and sometimes as agents, to buy goods for them. Messrs. Ryder bought the goods in their own names from the plaintiff, who had bought from them in the past. The plaintiff did not inquire whether they were acting as agents or as principals, and supplied the goods on credit. The defendants paid

¹ *Irvine & Co. v. Watson & Sons* (1880), 5 Q.B.D. 414.

² *Priestley v. Fernie* (1865), 3 H. & C. 977.

³ *Wyatt v. Hertford (Marquis of)* (1802), 3 East 147.

⁴ (1880), 5 Q.B.D. 414.

⁵ (1872), L.R. 7 Q.B. 598.

Messrs. Ryder for the goods in the ordinary course of business. A fortnight later, Messrs. Ryder stopped payment, not having paid the plaintiff. Upon discovering the agency, the plaintiff sued the defendants for the price.

His action failed. It was held that the demand for payment could not be made from 'those who were only discovered to be principals after they had paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit'.¹ But this case is contrary to earlier authority,² and it was criticized by the Court of Appeal in *Irvine & Co. v. Watson & Sons*.³ It may therefore be that it does not represent the law.

Payment by third party If it is the third party who settles with the agent, again the general rule is that he is not discharged. The reason for this is that an agent who is authorized to sell is not necessarily authorized to accept the purchase money. In *Butwick v. Grant*:⁴

The plaintiff through his agent, Chait, sold a quantity of sports-jackets to the defendant. After delivery, he sent in his account with his name printed on it. The defendant, however, paid Chait, who failed to deliver the money to the plaintiff. The plaintiff sued the defendant for the price of the jackets.

It was held that he was entitled to succeed as Chait had no authority to accept the money. Payment, however, to an agent who has such authority, either from an express mandate of the principal or in the ordinary course of business, will constitute a good discharge.⁵ It would also seem that where the principal is undisclosed, payment to the agent would then suffice, for he is a party to the transaction and could give a valid receipt.⁶

III. THE RELATIONS BETWEEN THE AGENT AND THIRD PARTIES

Agent employed to establish privity of contract Since an agent is employed to establish privity of contract between his principal and a third party, it is the general rule that he acquires no rights and incurs no liabilities in respect of those contracts into which he enters in the capacity of agent.

¹ At p. 610.

² *Heald v. Kenworthy* (1855), 10 Ex. 739.

³ (1880), 5 Q.B.D. 414, per Bramwell L.J. at p. 417.

⁴ [1924] 2 K.B. 483; *Drakeford v. Piercy* (1866), 7 B. & S. 515.

⁵ *Howard v. Chapman* (1831), 4 C. & P. 508; *International Sponge Importers v. Watt*, [1911] A.C. 279.

⁶ There is some doubt on this point, but since the third party can set up as a defence any set-off incurred *bona fide* before disclosure (*George v. Glagett* (1797), 7 Term Rep. 359) it would seem that payment to the agent would effectively bar the undisclosed principal's right to recover.

This rule, however, does not apply to those contracts into which he enters personally. It is therefore our first task to discover the circumstances in which he may be personally liable, and here much will depend upon whether or not the principal or the agency are disclosed at the time of the contract.

Agent Contracts for a Named Principal

Where an agent contracts, as agent, for a named principal, so that the other party to the contract looks through the agent to a principal whose name is disclosed, it may be laid down, as a general rule, that the agent drops out of the transaction so soon as the contract is made. He acquires neither rights nor liabilities under it.

Agent contracts for named principal

But this matter is always one of the proper construction to be put upon the conduct of the parties where the contract is oral, or upon the wording of the document and the surrounding circumstances if it is written.¹ There is nothing to prevent both principal and agent being severally liable on, and entitled to enforce, a contract which the agent has made on behalf of his principal if that was the intention of the parties.² The agent may, for example, expressly undertake liability for payment,³ or he may be considered impliedly to have done so by trade usage.⁴ Or the document in which the contract is written may give no indication that he was acting as agent, although both parties knew this to be the case: 'When a person signs a contract in his own name without qualification, he is *prima facie* to be deemed a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from the other parts of the document that he did not intend to bind himself as principal.'⁵

Whether agent personally liable is question of construction

There are, however, certain cases in which the law holds an agent personally liable, even though he contracts on behalf of his principal.

But agent is liable in any event

First, an agent who makes himself a party to a deed is bound thereby even though he is described as agent.⁶

(i) if party to a deed

¹ *Chapman v. Smith*, [1907] 2 Ch. 97, at p. 103.

² *Calder v. Dobell* (1871), L.R. 6 C.P. 486, at p. 494.

³ *Hall v. Ashurst* (1833), 1 C. & M. 714; *McCollin v. Gilpin* (1881), 6 Q.B.D. 516.

⁴ *Bayliffe v. Butterworth* (1847), 1 Ex. 425; *Fleet v. Murton* (1871), L.R. 7 Q.B. 126.

⁵ 3 *Smith's Leading Cases* (cited by Hanbury, *The Principles of Agency*, p. 155); *Brandt (H. O.) & Co., Ltd. v. Morris (H. N.) & Co., Ltd.*, [1917] 2 K.B. 784.

⁶ *Appleton v. Binks* (1804), 5 East 148.

(ii) if he signs negotiable instrument without qualification

Secondly, an agent who signs his name as party to a negotiable instrument, such as a bill of exchange or promissory note, either as drawer, indorser, or acceptor, will be personally liable even though he adds to his signature words which describe him as agent, or as filling a representative character.¹ He must go even further and indicate clearly that he is signing only on his principal's behalf. Thus the addition of the words 'receiver',² 'executor',³ or 'director'⁴ will not necessarily relieve him of liability; but such expressions as 'for and on behalf of X as agent', or '*per pro.*' will do so.⁵

(iii) If the principal is foreign

Thirdly, as we have already seen, there may be a presumption that an agent who contracts on behalf of a foreign principal will be personally liable.⁶ This presumption, if it exists, may be rebutted by evidence that the agent was not intended to be under a personal liability.

(iv) if principal not in existence

Finally, an agent who contracts on behalf of a non-existent principal runs the risk that he may be personally liable on the contract so made. The case of *Kelner v. Baxter*⁷ has previously been cited to show that a company cannot ratify contracts made on its behalf before it was incorporated. The same case also shows that the agent so contracting may incur the liabilities which the company cannot by ratification assume. 'Both upon principle and upon authority', said Willes J.,⁸ 'it seems to me that the company never could be liable upon this contract: and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable.' But the question is really one of construction, and the terms of the contract may be such as to show that the agent was not intended to have any rights⁹ or incur any liabilities¹⁰ under the contract. It is not the rule, therefore, that an agent is automatically liable whenever there is no principal capable of being bound by the agreement.

¹ Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 26. But where the agent *accepts* a bill of exchange which is not drawn upon him, he will not be liable even though his acceptance is unqualified: *Stacey & Co., Ltd. v. Wallis* (1912), 106 L.T. 541. See generally Chalmers, *Bills of Exchange* (12th ed.), p. 77.

² *Kettle v. Dunster and Wakefield* (1927), 43 T.L.R. 770.

³ *Liverpool Bank v. Walker* (1859), 4 De G. & J. 24.

⁴ *Elliott v. Bax-Ironside*, [1925] 2 K.B. 301.

⁵ *Ibid.*, per Scrutton L.J. at p. 307.

⁶ *Rusholme & Bolton & Roberts Hadfield, Ltd. v. S. G. Read & Co. (London), Ltd.*, [1955] 1 W.L.R. 146; *supra*, p. 518.

⁷ (1866), L.R. 2 C.P. 174; *supra*, p. 500.

⁸ At p. 185.

⁹ *Newborne v. Sensolid (Great Britain), Ltd.*, [1954] 1 Q.B. 45.

¹⁰ *Hollman v. Pullin* (1884), 1 Cab. & El. 254.

The Name of the Principal is Not Disclosed

An agent who contracts *as agent* but does not disclose the name of his principal is, as a rule, not personally liable on the contract which he makes. But here too, as where the name of the principal is disclosed, the matter is one of construction: Agency but not name of principal disclosed

There is no doubt at all, in principle, [said Blackburn J. in *Fleet v. Murton*¹] that a broker, as such, merely dealing as broker and not as purchaser of the article, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller, and that consequently where the contract, as in the present case, in terms says, 'Sold to A.B.,' or 'Sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods; he is simply the broker making the contract.

Thus, although there is a *prima facie* rule that the agent drops out of the transaction, the terms of the contract may indicate a contrary intention.² It is probably true to say that the Courts are more ready to infer personal liability in cases where the name of the principal is not disclosed than in cases where it has been revealed.

If a man has purported to contract as agent for an unnamed principal, can he declare himself to be the real principal? The answer is that he can, for if the other party to the contract was willing to take the liability of an unknown person, it is hard to suppose that the agent was the one man in the world with whom he was unwilling to contract. At any rate, the character or the solvency of the unnamed principal could not have induced the contract. Thus in *Schmaltz v. Avery*:³ Can agent reveal himself as principal?

The plaintiffs entered into a contract of charterparty with the defendant. The plaintiffs described themselves as 'agents of the freighter', and it was provided in the contract that, since they were contracting 'on behalf of another party' all personal liability on their part should cease when the cargo was shipped. They then revealed themselves as principals. It was held that they were entitled to do so.

The Existence of the Principal is Undisclosed

If the agent acts on behalf of a principal whose existence he does not at the time disclose (the 'undisclosed principal'),⁴ the other contracting party, when he discovers the true facts, is Undisclosed principal

¹ (1871), L.R. 7 Q.B. 126, at p. 131.

² *Viz. supra*, p. 525; or, for example, by trade usage.

³ (1851), 16 Q.B. 655; *Harper v. Vigors*, [1909] 2 K.B. 549.

⁴ *Viz. supra*, p. 518.

entitled to elect whether he will treat principal or agent as the party with whom he dealt.

The reason for this rule is plain. If *T* enters into a contract with *A*, he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that *A* is in fact the representative of *P*, he is entitled to choose whether he will accept the actual state of things, and treat *P* as the party to the contract, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat *A* as the party to it.

The liability of the agent continues until the other contracting party has done some act which unequivocally indicates that he regards the principal as the party solely liable to him.¹

Unauthorized Acts of the Agent

Where a person purports to act as agent for a named principal but without any real or apparent authority to do so, he cannot acquire any rights or incur any liability under the contract. But the party whom he induced to contract with him has one of two remedies.

First, he may sue on a warranty of authority. This is an implied promise on the part of the professed agent that, in consideration of the other party entering into the contract, he warrants that he has a principal and that he is contracting within the authority conferred by that principal.²

This rule applies not only to transactions or representations which would result in contract, but also to any representation of authority whereby one induces another to act to his detriment.³ And since it may arise without any fraud on the agent's part, it is sometimes regarded as an exception to the general rule that an action for damages will not lie against a person who honestly makes a representation which misleads another.⁴ Alternatively, it may be considered to be contained in an implied contract.⁵ The warranty is, however, a continuing warranty, and therefore the agent is liable even though his authority, though valid at the time of the contract, has been

¹ *Scarfv. Jardine* (1882), 7 App. Cas. 345.

² *Collen v. Wright* (1857), 8 E. & B. 647.

³ *Starkey v. Bank of England*, [1903] A.C. 114.

⁴ *Gandler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164; *supra*, p. 528.

⁵ *Yonge v. Toynbee*, [1910] 1 K.B. 215, *per* Buckley L.J. at p. 228.

determined without his knowledge, as by the death or insanity of the principal.¹

Secondly, if the professed agent knew that he had not the authority which he was assumed to possess, he may be sued by the third party in an action of deceit.

The case of *Polhill v. Walter*² is an illustration of this:

The defendant accepted a bill as agent for another who had not given him authority to do so. He knew that he had not the authority, but honestly expected that his act would be ratified. It was not ratified, the bill was dishonoured, and the defendant was sued by an indorsee of the bill.

He was held liable as having made a representation of authority false to his knowledge; he was thus guilty of legal, though not of moral, fraud.

¹ *Infra*, pp. 532, 533.

² (1832), 3 B. & Ad. 114; *supra*, p. 209.

CHAPTER XX

DETERMINATION OF AGENT'S AUTHORITY

AN agent's authority may be determined in one of two ways (1) by act of the parties, and (2) by operation of law.

In certain circumstances, however, it will be irrevocable.

By Act of the Parties

The relation of principal and agent is generally founded on mutual consent, and may be brought to a close by the same process which originated it, by agreement.

It may also be determined, so far as the principal and the agent are concerned, by an express revocation on the part of the principal, or an express renunciation on the part of the agent, although this will not affect the rights of third parties under the doctrine of 'holding out'.¹ Agency is thus *prima facie* determinable unilaterally and at will, subject, of course, to any claim which either party may have for breach of contract.

The principal may expressly or impliedly contract not to revoke the agent's authority during a fixed period, or until the agent has carried out the act which he has been authorized to do. In such a case the authority is sometimes loosely said to be 'irrevocable', but this is incorrect. The authority will be effectively revoked in the sense that the agent will not be allowed to continue to act as if it were still in existence. But the principal will be compelled to pay the agent damages for breach of contract, or to indemnify him against any liability already incurred. The revocation is therefore effective, but unlawful.²

It is not certain whether a principal must give notice to the agent that his authority has been revoked.³ If the parties expressly so provide in the agreement,⁴ or if a certain period of notice is customary in a certain trade,⁵ then notice must be given. Also where the agency is a continuing one, and analogous to a contract of service, the agent undertaking to serve the

¹ *Supra*, p. 502.

² Powell, *The Law of Agency*, p. 302.

³ Powell, *op. cit.*, p. 303.

⁴ *Brown v. Symons* (1860), 8 C.B., N.S. 208.

⁵ *Parker v. Ibbetson* (1858), 4 C.B., N.S. 346.

principal and the principal to pay for the services rendered, there is an implied term in the contract that the agency will not be revoked summarily, but only on reasonable notice.¹ But outside of these instances, it is by no means certain that an agent is entitled to notice that his authority has been revoked,² although it is clear that he ought to be so entitled.

By Operation of Law

There are certain circumstances which will put an end to the relationship of principal and agent by operation of law.

(a) Bankruptcy

The bankruptcy of either the principal³ or the agent⁴ will determine an agency for most purposes.

(b) Frustration

An agency which is created to deal with certain subject-matter will normally be frustrated by the destruction of that subject-matter.⁵ So, for example, if an agent is employed to effect an insurance on a particular piece of property, and the property is destroyed by fire, the agency determines. Also on the outbreak of war, where the principal becomes an enemy, the authority of the agent normally ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such an intercourse.⁶ But this is not invariably the case, for the agency may be of such a kind (for example, a general power of attorney)⁷ that it involves no continuing relationship and has no tendency to assist the enemy. In *Tingley v. Müller*:⁸

¹ *Martin-Baker Aircraft Co., Ltd. v. Canadian Flight Equipment, Ltd.*, [1955]

² Q.B. 556.

³ *Re Oriental Bank Corporation, ex p. Guillemin* (1884), 28 Ch. D. 634 (notice); *Nelson v. Rolfe*, [1950] 1 K.B. 139 (no notice).

⁴ Bankruptcy Act, 1914 (4 & 5 Geo. V, c. 59), ss. 37 (1), 45.

⁵ But only if the bankruptcy renders the agent unfit to perform his duties: *McCall v. Australian Meat Co.* (1870), 19 W.R. 188; *Bailey v. Thurstan*, [1903] 1 K.B. 137.

⁶ *Rhodes v. Forwood* (1876), 1 App. Cas. 256. Cf. *Turner v. Goldsmith*, [1891] 1 Q.B. 544; *supra*, p. 513.

⁷ *Sovfracht (v/o) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] A.C. 203, *per* Lord Porter at p. 254.

⁸ *Hangkam Kwintong Woo v. Liu Lan Fong*, [1951] A.C. 707.

⁹ [1917] 2 Ch. 144.

A German resident in England by the licence of the Crown (and for the time being therefore technically an alien friend) gave an irrevocable power of attorney to an agent and afterwards returned to Germany, thereby becoming in the full legal sense an alien enemy. The agent, acting under the power of attorney, entered into a contract for the sale of his land, but the purchaser, upon discovering the facts, refused to complete the purchase.

The full Court of Appeal (Scrutton L.J. dissenting) held that the power of attorney had not been determined upon the acquisition by the principal of enemy status, and that the purchaser was bound to complete the purchase.

The frustrating event must, however, be so extensive as to render the mandate inoperative in the new situation which has emerged.¹ If the agency is contained in a contract, and the contract is frustrated, the Law Reform (Frustrated Contracts) Act, 1943, will apply. But if it is not, then the parties only enjoy those rights which they possess at common law.

(c) *Death*

The death (or if the principal is a corporation, the dissolution) of the principal determines at once the authority of the agent,² leaving a third party to his remedy against the agent for breach of warranty of authority. It is not necessary for the agent to have notice of the death, so that he may become liable for such breach of warranty, even though he was ignorant of the fact that his authority had been determined by the death and he had no means of finding out that this was so.³ The representatives of a deceased principal may, however, ratify any contract entered into on behalf of the estate,⁴ but they are in no way bound to do so.

A statutory qualification exists in the case of powers of attorney. Any person making any payment or doing any act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become subject to disability or bankrupt, if the circumstances were unknown to him at the time.⁵

The death of the agent also determines the agency.⁶

¹ *Turner v. Goldsmith*, [1891] 1 Q.B. 544; *supra*, p. 513.

² *Watson v. King* (1815), 4 Camp. 272.

³ *Yonge v. Toynbee*, [1910] 1 K.B. 215.

⁴ *In re Watson* (1886), 18 Q.B.D. 116.

⁵ Law of Property Act, 1925 (15 & 16 Geo. V, c. 20), s. 124. See also Wolff (1946), 62 L.Q.R. 273.

⁶ *Friend v. Young*, [1897] 2 Ch. 421.

(d) Insanity

The effect of the insanity of the principal is a matter of some difficulty. In *Yonge v. Toynbee*:¹

The defendant, after instructing solicitors to defend on his behalf a threatened action, became insane before the action was heard. The solicitors, in ignorance of this fact, duly entered an appearance to the writ, and took all necessary steps on their client's behalf. When the defendant's insanity became known to the plaintiff, he sought to have the appearance and all subsequent proceedings struck out, and to make the solicitors personally liable for the costs incurred, on the ground that their authority to act had been determined by the defendant's insanity.

The Court of Appeal decided in the plaintiff's favour, holding that the solicitors had warranted an authority which they had ceased to possess.

On the other hand, in *Drew v. Nunn*:²

The defendant, being sane, held out his wife to have authority to deal with the plaintiff on his behalf. He subsequently became insane, but the wife continued to deal with the plaintiff who had no notice of the defendant's insanity. The defendant recovered, and sought to resist an action against him for the price of the goods supplied to his wife during the period of his insanity.

This defence did not succeed. The Court of Appeal did not expressly decide how far insanity affected the continuance of authority, but held that 'the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act upon his behalf, and that until the plaintiff had knowledge that this authority was revoked he was entitled to act on the defendant's representations'.³

These two cases can be reconciled on the ground that, although insanity puts an end to the agency as between principal and agent, it can have no effect on third parties who continue to contract in the belief that the agency is still in existence. The principal is estopped from denying the authority of the agent unless and until the third party becomes aware of the revocation. Nevertheless the decision in *Yonge v. Toynbee* does produce one somewhat curious result, for, as we have seen,⁴ if a man contracts with an insane person, the contract is good unless, at the time of contracting, he was aware of

¹ [1910] 1 K.B. 215.

² (1879), 4 Q.B.D. 661; *Re Parks. Canada Permanent Trust Co. v. Parks* (1957), 8 D.L.R. (2d) 155.

³ *Ibid.*, per Brett L.J. at p. 669.

⁴ *Supra*, p. 198.

the insanity. But if he contracts with an insane person through an agent, and no question of estoppel arises, the contract is void, even though he had no knowledge of the insanity.

The insanity of the agent would also seem to determine the agency.

Irrevocable Authority

The authority given to an agent may become irrevocable in three main instances: (a) when it is coupled with an interest, (b) when it is given under seal, (c) when revocation would cause the agent personal loss.

(a) Authority coupled with an interest

An authority coupled with an interest is irrevocable during the subsistence of the interest.

This rule has been explained by Wilde C.J. to mean that 'where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable'.¹ So where a principal and agent agree for consideration or under seal that the agent is to have authority, for example, to collect rents in order to secure a loan,² or to buy shares to enable a company to purchase his property,³ the principal thereby confers a benefit on the agent, and the agency cannot be revoked unilaterally.

But the authority must be given with the object of securing a benefit to the donee, and it is not sufficient that it does so incidentally. Thus in *Smart v. Sandars*:⁴

The defendants, who were corn factors, were entrusted by the plaintiffs with certain wheat to sell on their behalf. They subsequently advanced the sum of £3,000 to the plaintiffs, which the plaintiffs failed to repay. The plaintiffs gave orders that the wheat was not to be sold, but the defendants nevertheless sold it to secure their advance.

In an action against them, the defendants pleaded that the agency, being coupled with an interest, was irrevocable; but the Court held that this was an improper application of the rule. The authority had not been given to secure the advance of £3,000, since it had been given prior to, and independently of, the loan.

¹ *Smart v. Sandars* (1848), 5 C.B. 895, at p. 917.

² *Spooner v. Sandilands* (1842), 1 Y. & C. Ch. 390.

³ *Garmichael's Case*, [1896] 2 Ch. 643.

⁴ (1848), 5 C.B. 895.

(b) Authority under seal

Powers of attorney which are given for valuable consideration and which are stated in the instrument creating them to be irrevocable cannot be revoked at any time either by anything done by the donor of the power without the concurrence of the donee, or by the death, disability, or bankruptcy of the donor of the power. Any purported revocation will be ineffective both as regards the donee and a purchaser for value.¹

Powers of attorney, whether given for valuable consideration or not, which are stated in the instrument creating them to be irrevocable for a fixed time not exceeding one year from the date of the instrument are similarly rendered irrevocable during that period.²

Neither the donee of the power nor a purchaser will at any time be prejudicially affected by notice of the act or event which would, but for these qualifications, give rise to a revocation.³

(c) Agent liable to personal loss

Where the agent has, in pursuance of his authority, contracted a personal liability or become liable to personal loss, the agency cannot be revoked by the principal without his consent, for this would be to defeat rights already established.

The liability incurred by the agent may either be a legal liability, as where he binds himself by contract to pay to a creditor of his principal a debt which he has been authorized to receive;⁴ or it may simply be a loss which is likely to occur in fact, for example, where a betting commissioner places bets on behalf of his principal which he must pay or lose his business.⁵ Thus in *Seymour v. Bridge*:⁶

The defendant employed the plaintiffs, who were stockbrokers, to buy shares for him according to the rules of the Stock Exchange. They purchased the shares from a jobber in the usual way, but the defendant, before settling day, repudiated the transaction on the ground that the numbers of the shares had not been specified in accordance with Lee-man's Act, 1867.⁷ This Act would indeed have invalidated the purchase,

¹ Law of Property Act (15 & 16 Geo. V, c. 20), s. 126; Wolff (1946), 62 L.Q.R. 273. ² Ibid., s. 127. ³ Ibid., ss. 126 (3), 127 (3).

⁴ *Hodgson v. Anderson* (1825), 3 B. & C. 342.

⁵ *Read v. Anderson* (1884), 13 Q.B.D. 779, now reversed by the Gaming Act, 1892 (55 & 56 Vict., c. 9), s. 1; *supra*, p. 289.

⁶ (1885), 14 Q.B.D. 460.

⁷ Banking Companies' (Shares) Act, 1867 (30 & 31 Vict., c. 29).

but the Stock Exchange forces its members to complete such bargains under pain of expulsion. The defendant must have been taken to have known of this rule as he contracted on that basis.

It was held that the defendant could not revoke his authority so as to cause the plaintiffs actual loss, and that he was bound to indemnify them for the money which they had paid for the shares.

The liability or loss must have been in the contemplation of the parties at the time that the authority was conferred. As was said by Bowen L.J. in *Read v. Anderson*:¹

It seems to me that it was well understood to be *part of the bargain* that the principal should recoup his agent, and should not revoke his authority to pay, but should indemnify the agent against all payments made in the ordinary course of business.

Thus where an investor did not know of the custom in *Seymour v. Bridge*, he was held, under circumstances in other respects precisely similar to those in that case, not to be bound to pay for the shares.² Also the principle does not apply where the contract entered into by the agent is not merely void, but illegal.³

¹ *Read v. Anderson* (1884), 13 Q.B.D. 779, at p. 783.

² *Perry v. Barnett* (1885), 15 Q.B.D. 388.

³ *Viz. supra*, p. 325.

PART VII
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QUASI-CONTRACT

CHAPTER XXI. QUASI-CONTRACT

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CIRCUMSTANCES must occur under any system of law in which it becomes necessary to hold one person to be accountable to another, without any agreement on the part of the former to be so accountable, on the ground that otherwise he would be retaining money or some other benefit which has come into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability the other would unjustly suffer loss. The law of quasi-contract exists to provide remedies in circumstances of this kind.

The nature
of quasi-
contract

The term is not a happy one, though, as we shall see, the history of this branch of the law provides some justification, or at least an explanation of it. But it implies a resemblance to contract which is often not very close, and which sometimes does not exist at all. Unfortunately, however, the difficulty of inventing a better name which would have a chance of being accepted has not yet been overcome.¹

It is difficult, too, to find a satisfactory definition of a quasi-contract, for almost all suggested definitions either exclude cases which our law considers to be quasi-contracts, or include cases which it does not. If English law had developed according to some scientific plan, quasi-contract would probably be coupled with many other cases in which the law compels the restitution of money or other benefit, but which, for historical reasons, we now classify under other rubrics of the law such as tort or trusts.² As it is, it will be best to content ourselves with trying to enumerate the distinctive marks of a quasi-contractual right.

In the first place, such a right is always a right to money, and generally, though not always, to a liquidated sum of money. Secondly, it does not arise from any agreement of the parties

Distinctive
marks of
quasi-con-
tractual
right

¹ Sir Frederick Pollock, *Principles of Contract* (13th ed.), p. 11, prefers the term 'constructive contract', and this is also found in Halsbury's *Laws of England* (3rd ed.), viii. 225. Chitty, *Law of Contracts* (21st ed.), has an early chapter on 'Implied Contracts and Quasi-contracts' (p. 69). But the term is generally recognized, and it is also seen that the obligation is *sui generis*: Lord Wright, *Legal Essays*, i and ii; Winfield, *Province of the Law of Tort*, ch. viii.

² *Infra*, p. 574.

concerned, but is imposed by the law, so that in this respect a quasi-contract resembles a tort. Thirdly, it is a right which is available not, like the rights protected by the law of torts, against all the world, but against a particular person or persons only, so that in this respect it resembles a contractual right.

A quasi-contractual right may arise in a number of different situations. Although these situations seem, at first, to have little or nothing in common with each other except that they were linked together procedurally before the abolition of the forms of action in 1852, it has long been apparent that there is some sort of general principle behind them. In most cases the plaintiff is seeking to recover from the defendant a benefit which has been conferred upon the defendant at his (the plaintiff's) expense, and which it would be unjust for the defendant to retain. The principle is, then, one of unjust benefit, or unjust enrichment;¹ and this benefit may have been conferred on the defendant by the plaintiff himself, or by some person other than the plaintiff.

I. BENEFITS CONFERRED BY THE PLAINTIFF ON THE DEFENDANT

Under this general heading we are concerned with three common law actions of a quasi-contractual nature:

- (i) for money paid by the plaintiff to the defendant's use;
- (ii) for money had and received by the defendant to the plaintiff's use;
- (iii) *quantum meruit*.

Money Paid by the Plaintiff to the Defendant's Use

In this action the plaintiff claims to be compensated by the defendant for money paid out by him to the defendant's use.

- (a) *Discharge, under a legal obligation, of a liability primarily imposed on the defendant*

A person who has paid out money in discharge of a legal duty owed by him to a third party, but which, as between himself and another, should have been discharged by that other, can recover from the other the money so paid.²

¹ *Infra*, p. 565.

² See generally Winfield (1944), 60 L.Q.R. 341.

This principle finds its most express formulation in a passage in Leake on Contracts¹ which was cited with approval by Cockburn C.J. in *Moule v. Garrett*:²

Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.

It was applied by the Court of Appeal in *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers*:³

The plaintiffs were warehousemen who had undertaken to store certain skins in bond for the defendants. The skins were stolen, and they were called upon to pay the customs duty on them. The primary liability to pay the duty lay on the defendants, the owners of the skins, but by the Customs Consolidation Act, 1875, s. 85, the plaintiffs could also be compelled to pay. They paid the duty, and sought to recover it from the defendants.

It was held that they were entitled to succeed:

The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or *pro tanto*, whereas the defendant is primarily liable to pay as between himself and the plaintiff.⁴

Other illustrations of the circumstances in which this principle applies may be found in the case of sureties and joint tortfeasors. If a surety pays the debt of his principal debtor, or one of several co-sureties pays more than his due share of the debt for which they are all liable, he is entitled to an indemnity or contribution, as the case may be, in respect of the sums so paid out.⁵ This is so even though there has been no agreement to indemnify or contribute. Similarly, since the Law Reform (Married Women and Tortfeasors) Act, 1935,⁶ if one of several joint tortfeasors is compelled to pay the damages for which all are liable, he may claim a contribution from the others, although the Act contains special provisions defining the extent of the right in this case.

¹ (8th ed.), p. 46.

² (1872), L.R. 7 Ex. 101, at p. 104.

³ [1937] 1 K.B. 534; *Gebhardt v. Saunders*, [1892] 2 Q.B. 452.

⁴ *Ibid.*, per Lord Wright at p. 544. See also (1937), 53 L.Q.R. 302, 447, 449.

⁵ *Kemp v. Finden* (1844), 12 M. & W. 421.

⁶ 25 & 26 Geo. V, c. 30, Part II, s. 6.

Requirements It is important to note, however, two basic requirements which must be fulfilled before the rule can be applied:

(i) defendant must have been under legal duty to pay In *Receiver for the Metropolitan Police District v. Croydon Corporation*:¹

A police constable in the Metropolitan Police was injured while on duty by the negligent driving of a motor-lorry owned by the defendants. As a result of the accident, the constable was unfit to resume his duties, and the Receiver in pursuance of a statutory duty laid upon him, paid the constable the sum of £104 as sick-pay during the period that he was incapacitated. He now sought to recover this sum from the defendants.

It was argued on behalf of the Receiver, that had he not paid out the money, the constable would have recovered an equivalent amount from the defendants in an action for negligence; he had thus relieved the defendants of their liability to pay this sum. The Court of Appeal rejected this contention. The only obligation of the defendants was to compensate the constable for the loss actually suffered, and no more; they were under no liability to pay sums representing a hypothetical loss of earnings never incurred. Unlike the *Brook's Wharf Case*, the defendants were never compellable at any time to pay any more than that which they had in fact paid. The action therefore failed.

(ii) plaintiff's payment must not be voluntary Secondly, the *plaintiff* must have been under a legal liability to pay the money. If he chooses *voluntarily* to pay money in discharge of the defendant's liability, he will have no claim to reimbursement. As we have seen,² English law does not favour the *negotiorum gestor*, the 'officious bystander', who intervenes, without being requested to do so, on another's behalf. So, for example, if *A* pays the premiums on *B*'s insurance policy in order to prevent the policy from lapsing, he cannot recover the money from *B*.³ Also in *Macclesfield Corporation v. Great Central Railway*:⁴

The defendants were canal owners, whose statutory duty it was to repair a bridge carrying a highway over one of their canals. The bridge

¹ [1957] 2 Q.B. 154. See (1957), 35 Can. Bar Rev. 213.

² *Supra*, p. 506.

³ *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234. If, however, the defendant has the option whether to accept or refuse the benefit conferred, and elects to accept it, he will be taken to have ratified the expenditure: *Leigh v. Dickeson* (1884), 15 Q.B.D. 60, at p. 64.

⁴ [1917] 2 K.B. 528.

fell into disrepair, and the plaintiffs, the highway authority, called upon them to repair it. The defendants having failed to do so, the plaintiffs themselves undertook the repairs, although they had no legal liability to do the work. They subsequently sued the defendants for the expenses of the work done.

Their action failed. They were merely volunteers, and had no claim to an indemnity from the defendants.

(b) *Discharge, under compulsion, of the defendant's liability to a third party*

In the cases cited above, the application of the *Brook's Wharf* principle was seen to depend upon the presence of a legal duty in the plaintiff to pay the money which the defendant was ultimately liable to pay. But this is not the only situation in which the plaintiff is entitled to reimbursement. If he is compelled, either by threats of legal action or by some other pressure recognized by the law, to discharge the defendant's liability to a third party, he will likewise be able to recover.¹

Discharge of defendant's duty to third party because of compulsion

The clearest example is provided by seizure, or threats of seizure, of the plaintiff's property. A person who, to prevent the lawful taking or detention of his property which has been lawfully taken or detained, has paid money in the proper discharge of the duty of another, is entitled to recover from that other the money which he has paid. In *Exall v. Partridge*:²

Seizure for distress

The plaintiff put his carriage on the defendant's premises, and the defendant's landlord lawfully seized it as distress for rent due from the defendant. In order to redeem it, the plaintiff was forced to pay off the arrears of rent, and then brought an action to recover the money paid from the defendant.

It was held that he was entitled to do so.

We may, perhaps, record here that there are certain situations in which the law will hold that the presence of some moral or social duty in the plaintiff to expend the money will amount to compulsion, or, at any rate, prevent him from being a mere volunteer. A person, for example, who reasonably incurs expenses in the burial of another can recover the money from the deceased's executors.³ It may be, too, that an agency of necessity in relation to necessities supplied to a married woman

and other examples

¹ Winfield (1944), 60 L.Q.R. 341.

² (1799), 8 Term R. 308; *Edmunds v. Wallingford* (1885), 14 Q.B.D. 811.

³ *Rogers v. Price* (1829), 3 Y. & J. 28.

is an example of this same principle,¹ although, of course, the trader is under no real duty to discharge *pro tanto* the husband's liability to maintain his wife.

(c) *Payment to a third party at the request of the defendant*

Request by defendant to pay third party A person who pays money or incurs liabilities at the request of another, whether express or implied, is entitled to recover from that other in respect of the expenses or liabilities so incurred.

We have already seen that the relationship of principal and agent imports by implication a contract that the principal will indemnify the agent against all liabilities properly incurred in the course of his employment.² Here the liability of the principal arises *ex contractu*, and this will be the case in most situations to which this principle applies. Occasionally, however, when for some reason the contractual remedy is not available, a plaintiff may be obliged to claim in quasi-contract, and there is no doubt that he is entitled to succeed. In *Brewer Street Investments, Ltd. v. Barclays Woollen Co., Ltd.*:³

During the course of negotiations for a lease, the defendants, the prospective tenants, requested the plaintiffs, the landlords, to make certain alterations to the premises before they entered into occupation, and agreed to accept responsibility for the work. The negotiations broke down before the work was completed, and the defendants refused to reimburse the landlords for the expenses incurred by them in relation to contractors engaged to carry out the work.

The Court of Appeal held that the landlords were entitled to recover these expenses. Denning L.J. pointed out⁴ that the claim could not be brought on the contract, for the work specified in the contract had not been completed. The defendants' liability was in quasi-contract, for money paid out at their request.

Payment may be voluntary The payment made by the plaintiff may be purely voluntary. It need not be the result of any legal liability, or compulsion.⁵ Nor need it operate so as to relieve the defendant of a liability, for the claim to reimbursement is not affected by the fact that the payment is not made in discharge of a debt for which the defendant would himself be liable.⁶

¹ *Supra*, p. 505.

² *Supra*, p. 513.

³ [1954] 1 Q.B. 428.

⁴ At p. 435.

⁵ *Knight v. Cambers* (1855), 15 C.B. 362. Cf. *Re Cleadon Trust, Ltd.*, [1939] Ch. 286.

⁶ *Brittain v. Lloyd* (1845), 14 M. & W. 762; *supra*, p. 82 (the liability to pay duties being cast upon the auctioneer, and not upon the vendor). And see

Money Had and Received by the Defendant to the Plaintiff's Use

This is the most comprehensive head of quasi-contract, and the circumstances which give rise to it are very numerous. It is possible, however, to enumerate the main types of case in which the law will hold that one man has received money to the use of another and ought therefore to pay it over to him. Action for money had and received

(a) Money paid by the plaintiff to the defendant under a mistake of fact

A person who pays money to another under a mistake of fact which, if true, would make him legally liable to make such a payment, can recover from that other the money paid.¹ Money paid by mistake

The foundation of the modern law is the case of *Kelly v. Solari*:²

The plaintiff was the director of an insurance company which had paid certain sums to the defendant on a life insurance policy taken out by the defendant's wife. The policy had, in fact, lapsed by reason of the non-payment of the premiums by the assured. The company had known of this, but at the time the money was paid the lapse had been overlooked. The plaintiff claimed to recover it from the defendant.

It was held that he was entitled to do so. Parke B. said:³

I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it.

The principle was applied in *Norwich Union Fire Insurance Society, Ltd. v. Price (W. H.), Ltd.*⁴ where it was also pointed Mistake must be fundamental

Knight v. Cambers (1855), 15 C.B. 362. It has, however, been contended by Dr. Jackson in his *History of Quasi-Contract*, p. 54, that for a request to be implied by law (as opposed to one inferred by the conduct of the parties) it is necessary that the payment should relieve the defendant of some liability. But this would seem too narrow a principle, particularly where the plaintiff has been placed by the defendant in a position where he can be legally compelled to pay the money. See Winfield, *The Law of Quasi-Contracts*, p. 79.

¹ See Landon (1935), 51 L.Q.R. 650, (1936), 52 L.Q.R. 478; Tylor (1936), 52 L.Q.R. 27; Hamson (1937), 53 L.Q.R. 118; Winfield (1943), 59 L.Q.R. 327; (1944), 60 L.Q.R. 205, 341; Marsh (1946), 62 L.Q.R. 333; Lord Denning (1949), 65 L.Q.R. 37; Jones (1957), 73 L.Q.R. 48.

² (1841), 9 M. & W. 54.

³ At p. 58.

⁴ [1934] A.C. 455; *Baylis v. Bishop of London*, [1913] 1 Ch. 127; *Turvey v. Dentons* (1923), *Ltd.*, [1953] 1 Q.B. 218.

out that the mistake must, in addition, be 'basic' or 'fundamental' to the extent that it prevents the person paying the money from forming that intention which the law regards as essential to an agreement or to the transfer of money or property:

The plaintiffs were an insurance company who had become the insurers of a cargo of lemons under a marine insurance policy. In the mistaken belief that the cargo had perished they made a payment to the insured. In fact, the lemons had been sold *en route*.

The Judicial Committee of the Privy Council held that the money must be repaid.

Mistake must, if true, render plaintiff legally liable to pay It has also been frequently stated that the mistake must be such that, if the imagined state of facts were actually true, the plaintiff would be under an obligation to pay the money.¹ A payment which is merely voluntary is irrecoverable. This requirement was formulated by Bramwell B. in *Aiken v. Short*,² in a *dictum* which has often been discussed and applied in later cases:

In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.

Thus in *Morgan v. Ashcroft*:³

The plaintiff was a bookmaker. Owing to a mistake on the part of his clerk in making up the accounts, he overpaid the defendant, who had been in the habit of placing bets with him, by some £24. He now sought to recover this money.

His action failed on two grounds: first, because of the Gaming Act, 1845, which inhibited the Court from looking at betting transactions,⁴ and secondly, because even if the supposed fact had been true, the plaintiff would have been under no legal liability to make the payment. He was merely making one kind of voluntary payment instead of another. The facts therefore brought the case within the rule laid down by Bramwell B. Nevertheless, Sir Wilfrid Greene M.R. was inclined to question the rule.⁵ He thought that any mistake of fact which was sufficiently fundamental might allow a plaintiff to recover the

¹ *Deutsche Bank v. Beriro & Co.* (1895), 1 Com. Cas. 123, 255; *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; *Maskell v. Horner*, [1915] 3 K.B. 106; *Ayres v. Moore*, [1940] 1 K.B. 278.

² (1856), 1 H. & N. 210, at p. 215.

³ [1938] 1 K.B. 49.

⁴ *Viz. supra*, p. 283.

⁵ At p. 66.

money paid. A mistake as to the nature of the transaction, that is, that the payer thought he was discharging a legal obligation whereas, in fact, he was making a purely voluntary payment, would be but one example of such a mistake. But there might be other mistakes, for instance, a mistake as to the person, which would nevertheless give rise to the action, even though the plaintiff realised that the payment which he was making was purely voluntary:¹

I am disposed to think that they [the observations of Bramwell B.] cannot be taken as an exhaustive statement of the law but must be confined to cases where the only mistake is as to the nature of the transaction. For example, if *A* makes a voluntary payment of money to *B* under a mistaken belief that he is *C*, it may well be that *A* can recover it.

The doubts here expressed would seem to be partially confirmed by the decision of the Court of Appeal in *Larner v. London County Council*,² where the Court considered that the existence of a belief on the part of the payer that he was morally obliged to pay would be sufficient to prevent the payment from being purely voluntary: or to prevent payment from being purely voluntary

The defendants, the London County Council, resolved to pay all their employees who went off to the war the difference between their service pay and their civil pay. The plaintiff was an employee of the defendants who went off to the war, and so received this increment. He was instructed by the defendants to inform them of any changes in his service pay, but neglected to do so. As a result they overpaid him.

It was clear that the payments to the plaintiff were not made in the discharge of a legal liability. Nevertheless, the Court held that the defendants were entitled to reclaim them. They were 'in honour bound' to fulfil the promise which they had made to their employees, and so they could not be considered to be merely volunteers.

Money paid under a mistake is only recoverable by an action for money had and received if the mistake is one of fact. Mistake must be one of fact and not of law It must not be one of law.³ The justice of this rule may be questioned, but it is well settled. It was laid down in *Bilbie v. Lumley*⁴ in 1802, and it has been frequently applied in subsequent cases. Thus money paid under a mistake as to the

¹ [1938] 1 K.B. 49, at p. 66.

² [1949] 2 K.B. 683. See also *Kerrison v. Glyn, Mills, Currie & Co.* (1911), 17 Com. Cas. 41.

³ See Winfield (1943), 59 L.Q.R. 327.

⁴ (1802), 2 East 469.

effect of the Rent Acts,¹ or of the Income Tax Acts,² or as to the construction of Admiralty orders and regulations,³ cannot be recovered, as the mistake is one of law. The difficult question, however, is to know what is a mistake of fact as opposed to one of law.⁴ Many 'factual' statements involve questions of law, 'that a person is a married woman, that goods are uncustomed, that a building is a public house, and that a man is a voter'.⁵ Conversely, many mistakes of law derive from mistakes of fact, especially when, as here, the mistake of fact must lead the party mistaken to believe that he is under a legal obligation to make the payment.⁶ It is therefore no easy matter to distinguish one from the other, and the Courts have not unnaturally exhibited a certain amount of well-meant inconsistency in particular cases.

It is sometimes said, for example, that a mistake as to private right of property is a mistake of fact, even though it is based on an erroneous view of the law.⁷ It will be remembered that, in *Cooper v. Phibbs*,⁸ the petitioner agreed to take the lease of a salmon fishery from the defendants. He later discovered that it belonged to himself already as tenant in tail. The House of Lords set the contract aside on the ground that he had contracted under a mistake.

It is said [observed Lord Westbury] '*Ignorantia juris haud excusat*'; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application.

This proposition is, however, by no means universally applicable. In the first place, *Cooper v. Phibbs* was a case in equity, and, in equity, the distinction between law and fact has been much less rigidly maintained than at common law.¹⁰ Secondly, the petitioner was suing for rescission of the contract and not for

¹ *Sharp Bros. & Knight v. Chant*, [1917] 1 K.B. 771; *Sawyer and Vincent v. Window-Brace, Ltd.*, [1943] 1 K.B. 32.

² *National Pari-Mutuel Association v. The King* (1930), 47 T.L.R. 110.

³ *Holt v. Markham*, [1923] 1 K.B. 504. ⁴ *Viz. supra*, pp. 222, 242.

⁵ *Territorial and Auxiliary Forces Association of London v. Nichols*, [1949] 1 K.B. 35, at p. 43 (*Pritt K.C. arguendo*); *viz. supra*, p. 222.

⁶ *Turvey v. Dentons (1923), Ltd.*, [1953] 1 Q.B. 218.

⁷ *Meadows v. Grand Junction Waterworks Co.* (1905), 69 J.P. 655; *Anglo-Scottish Beet Sugar Cpn. v. Spalding U.D.C.*, [1937] 2 K.B. 607.

⁸ (1867), L.R. 2 H.L. 149; *supra*, p. 271.

⁹ At p. 170.

¹⁰ *Ministry of Health v. Simpson*, [1951] A.C. 251. The case of *Bilbie v. Lumley* (1802), 2 East 469 seems to have introduced the distinction into the common law.

return of money paid under an action for money had and received.¹ Thirdly, it is well established that a mistake as to the construction of a private document, such as a separation deed, is a mistake of law and not of fact.²

There are, however, certain exceptions to the rule that a mistake of law is insufficient. Where money is paid under a mistake of law to a trustee in bankruptcy or to a solicitor, it must be repaid for it would be 'dishonourable' for an officer of the Court to retain the money.³ Also, where a person makes a conditional payment, or a payment under protest, as, for example, where a taxpayer pays tax, or a trader customs dues, subject to a correct determination of the law, he pays without prejudice to his ultimate right of recovery.⁴

The fact that the person making the payment was negligent in failing to discover the true facts will not, of itself, affect his claim to be repaid.⁵ Although one who pays money well knowing that he is under no obligation to do so cannot recover, this does not extend to cases where the plaintiff ought to have known that he could not be made to pay. In *Kelly v. Solari*,⁶ for example, it was argued that the company, having once known that the policy had lapsed, were debarred by their negligence from recovering. But the fact that means of knowledge were available to the plaintiff at the time of payment is relevant only in so far as it may throw doubt on the genuineness of his alleged mistaken belief, or suggest that he intended to pay the money in any case, without reference to the truth or falsehood of the fact. It cannot, of itself, bar his claim.

In certain circumstances, however, the conduct of the person making the payment may be such as to estop him from recovering the money.⁷ An estoppel arises when one person, by words or conduct, makes to another a representation of fact, intended to be acted upon, and in fact acted upon by the other to his detriment. In *Holt v. Markham*:⁸

¹ *Supra*, p. 271.

² *Ord v. Ord*, [1923] 2 K.B. 432.

³ *Ex parte James* (1874), L.R. 9 Ch. App. 609; *ex parte Simmons* (1885), 16 Q.B.D. 308.

⁴ *Sebel Products, Ltd. v. Commissioners of Customs and Excise*, [1949] 1 All E.R. 729. Statements of Vaisey J. in this case, however, take the subject further.

⁵ *Weld-Blundell v. Synott*, [1940] 2 K.B. 107; *Turvey v. Dentons* (1923), Ltd., [1953] 1 Q.B. 218.

⁶ (1841), 9 M. & W. 354; *supra*, p. 545.

⁷ Lord Denning (1949), 65 L.Q.R. 37, at p. 49; Jones (1957), 73 L.Q.R. 48.

⁸ [1923] 1 K.B. 504; *Deutsche Bank v. Beriro & Co.* (1895), 1 Com. Cas.

The plaintiffs, who were government agents, made a mistake as to the construction of certain Admiralty regulations, and paid the defendant a gratuity to which he was not entitled. They discovered the mistake, and wrote to the plaintiff to inform him. The defendant replied with a letter of protest, and for several months heard nothing at all from the plaintiffs. In the meantime, in the belief that the money was his, he cashed some of his War Savings certificates, and invested the money in a company which failed. The plaintiffs then claimed to be repaid.

The Court of Appeal held that they were estopped from claiming this relief.¹ The defendant had been misled by their conduct into the belief that he might retain the money, and he had acted to his detriment on the strength of this belief.

But it is only rarely that a defendant will be able to rely on this defence. In the first place, the conduct of the plaintiff must amount to a representation,² and the mere payment over of the money to the defendant does not constitute such a representation unless there are other circumstances present.³ Secondly, the defendant must have acted upon the representation to his detriment.⁴ The fact that the defendant has spent the money will not normally be considered a sufficient detriment unless he has actually changed his position for the worse,⁵ for example, by cashing his own securities as in *Holt v. Markham*. But there is some authority for a more liberal attitude to this question, as is shown by the observations of Abbot C.J. in *Skyring v. Greenwood*:⁶

Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given to him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back.

Thirdly, it has been said⁷ that no estoppel can be raised in the absence of some special duty relationship between the person making the representation and the person to whom the representation is made—for example, between principal and

¹ The Court also held that there was no operative mistake of fact.

² *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, [1926] A.C. 670.

³ *Ibid.*, at p. 692.

⁴ *Ibid.*, at p. 684.

⁵ *Baylis v. Bishop of London*, [1913] 1 Ch. 127; *Larner v. London County Council*, [1949] 2 K.B. 683.

⁶ (1825), 4 B. & C. 281, at p. 289.

⁷ *Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, [1926] A.C. 670, *per* Lord Sumner at p. 693; *Weld-Blundell v. Synott*, [1940] 2 K.B. 107, at p. 115.

agent,¹ or banker and customer,² but this is not clearly established. Finally, if there is some fault on the part of the recipient of the money (as, for instance, in *Larner v. London County Council*,³ where the recipient failed to inform the Council of the changes in his pay) and it was this fault which led to the payment, he cannot claim that he was misled by the conduct of the payer, for it is evident that he was the author of his own 'deception'.

In the United States, where the defendant has 'changed his position' as a result of the payment, so that it would be inequitable for the plaintiff to recover the money, he cannot be made to refund it.⁴ But this doctrine does not apply to the English action for money had and received.⁵

(b) *Money paid by the plaintiff to the defendant in pursuance of an ineffective agreement*

Where one person pays money to another in pursuance of an agreement which is ineffective, or which subsequently becomes so, he may recover from that other the money which he has paid.

This head of quasi-contractual liability embraces a number of different situations.

In the first place, money deposited or paid by the plaintiff in pursuance of a contract which he expects to be performed by the defendant, but which the defendant fails to perform, can be recovered as money had and received by the defendant to the plaintiff's use. In *Hudson v. Robinson*:⁶

The defendant was a partner with two others in a copperas factory. Without the authority of his fellow partners, he agreed to deliver to the plaintiffs twenty tons of copperas, for which the plaintiffs paid him the sum of £140. Only one ton of copperas was delivered, and the plaintiffs sought to recover from the defendant the money which they had paid as money had and received by him to their use.

The Court of King's Bench held that they were entitled to do so. The consideration for the payment was the supposed right of the defendant to dispose of the goods as partnership property. The defendant had no such right, and so the plaintiffs could

¹ *Lloyds Bank v. Cocke*, [1907] 1 K.B. 794.

² *Deutsche Bank v. Beriro & Co.* (1895), 1 Com. Cas. 123, 255; *Holt v. Markham*, [1923] 1 K.B. 504.

³ [1949] 2 K.B. 683; *supra*, p. 547.

⁴ *Restatement of the Law of Restitution*, §§ 142, 178.

⁵ Cf. Lord Denning (1949), 65 L.Q.R. 37, at p. 49; Jones (1957), 73 L.Q.R. 48.

⁶ (1816), 4 M. & S. 475; *Wilkinson v. Lloyd* (1845), 7 Q.B. 27.

recover the money, as the consideration for which it had been paid had completely failed.

provided
failure of
considera-
tion total
and not
partial

It is necessary, however, for the failure of consideration to be total, and of a kind which entitles the person paying the money to treat the contract as at an end. If the contract has been partly performed and the plaintiff has derived some benefit from it, or if he has elected to treat the contract as still continuing, he cannot claim to recover the money which he has paid. This is well illustrated by the case of *Whincup v. Hughes*:¹

The plaintiff apprenticed his son to a watchmaker and jeweller for a term of six years in order to learn the trade. He paid for this a premium of £25. The watchmaker instructed the apprentice for one year, and then died. The plaintiff sought to recover a part of the premium for failure of consideration.

His action failed. It was held that, the contract having been in part performed, no part of the consideration could be recovered. However, in the case of a contract for the sale of goods² or of hire-purchase,³ a failure by the seller to convey a good title to the goods will constitute a total failure of consideration, even though the buyer or purchaser has received the goods and has had some use or enjoyment from them.

The reason for the failure is immaterial. It may, for instance, have been brought about by the death of the other party to the contract;⁴ or by his breach of the contract;⁵ or because the contract has been discharged by impossibility of performance.⁶ In the last case, however, recovery now depends on the provisions of the Law Reform (Frustrated Contracts) Act, 1943.⁷

(ii) recovery
by party
in breach

Secondly, it is possible for a person who has himself broken the contract to recover from the other party money deposited or paid by him in pursuance of the contract, unless the terms of the agreement provide otherwise. Thus in *Dies v. British and International Mining and Finance Corporation, Ltd.*:⁸

One Quintana had paid the sum of £100,000 to the defendants in part prepayment for the purchase of rifles and ammunition to be delivered

¹ (1871), L.R. 6 C.P. 78; *Hunt v. Silk* (1804), 5 East 449.

² *Rowland v. Divall*, [1923] 2 K.B. 500; *supra*, p. 127.

³ *Warman v. Southern Counties Car Finance Corporation, Ltd.*, [1949] 2 K.B. 576.

⁴ *Knowles v. Bowill* (1870), 22 L.T. 70.

⁵ *Rowland v. Divall*, [1923] 2 K.B. 500.

⁶ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32; *supra*, p. 448.

⁷ 6 & 7 Geo. VI, c. 40; *supra*, p. 448.

⁸ [1939] 1 K.B. 724; *Mayson v. Clouet*, [1924] A.C. 980.

under a contract. He later refused to complete the payments still due or to take delivery of the arms, and the defendants elected to treat this breach of contract as putting an end to it. But they refused to return the £100,000. Quintana assigned his rights to the plaintiff, who brought an action to recover the money.

Stable J. held that he might recover it, less the amount of any damages suffered by the defendants through the breach of contract by the plaintiff's assignor. It might seem strange, at first sight, that the party in default should have succeeded. But the learned judge pointed out that to hold otherwise would have allowed the defendants, in effect, to keep the money as liquidated damages, whereas it would really have been a penalty.¹ They could recover any damages they had actually suffered and were therefore amply protected. They ought not to be allowed to retain both the money and the goods which had not been delivered.

The right to claim the return of the money in the case of part payments may be expressly excluded by the terms of the agreement. In such a case it is a moot point whether the Court has jurisdiction to relieve the party in default from forfeiture of the money paid on the ground that it would be harsh and unconscionable for the other to retain it.²

Thirdly, it seems that money paid in pursuance of a void contract can be recovered. Had the respondents in *Bell v. Lever Brothers*³ succeeded in establishing that the contract was void for mistake, they would undoubtedly have been able to reclaim the money.⁴ Also, where a contract is void, as opposed to illegal, because it is contrary to public policy, money paid in pursuance of the contract can generally be recovered. So, for example, in *Chappell v. Poles*:⁵

(iii) money
paid in
pursuance
of void

The plaintiff was the father of an illegitimate child, and the defendants were the officers of the parish in which the child was born. An affiliation order was made against the plaintiff to pay a weekly sum of two shillings to the parish for the upkeep of the child. Subsequently, however, the plaintiff paid to the defendants the sum of £30 in return for an undertaking by them that they would exonerate him from all future charges and expenses. The defendants had expended some £5 of this money when the child died. The plaintiff claimed to recover the £30 less a set-off for the sum expended.

¹ Viz. *supra*, p. 475.

² *Stockloser v. Johnson*, [1954] 1 Q.B. 476; *supra*, p. 477.

³ [1932] A.C. 161; *supra*, p. 242. Cf. Lord Blanesburgh at p. 180.

⁴ See on this point (1935), 51 L.Q.R. 650; (1936), 52 L.Q.R. 27, 478; (1937), 53 L.Q.R. 118.

⁵ (1837), 2 M. & W. 867.

The Court held that he could do so. The agreement was contrary to public policy and void. The payment had therefore been made upon an unlawful consideration and could be recovered. Similarly it will be remembered that money paid in pursuance of a marriage brokerage contract can be reclaimed.¹

Where a certain type of contract is rendered void by statute, the question whether money paid in pursuance of such a contract must be refunded will depend upon the particular statute concerned. In the case of contracts rendered void by the Gaming Act, 1845, for example, money paid cannot be reclaimed.² On the other hand, in the case of infants' contracts which are caught by the Infants' Relief Act, 1874, the infant can recover the money which he has paid, provided that he has received no benefit under the contract.³ But this privilege is not granted to the adult party.

Illegality If money is paid under a contract which is not only void, but illegal, it cannot be recovered, since *in pari delicto potior est conditio defendentis*.⁴ But, as we have seen, there are exceptions to this rule: where the parties are not *in pari delicto*⁵ and where the illegal purpose has not yet been accomplished.⁶ Paradoxically, however, if the contract is one to do something lawful in itself, but one of the parties intends to abuse it for an illegal purpose, the innocent party can still not recover his money. The contract is *ex facie* valid, and money paid under a valid contract cannot be reclaimed.⁷

(c) *Waiver of tort*⁸

Waiver of tort A person against whom a tort has been committed sometimes has a choice of remedies. He may either bring an action in tort for damages, or he may bring one in quasi-contract to recover the value of the benefit obtained by the tortfeasor through his wrongful act. If he chooses the quasi-contractual remedy, he is sometimes said to 'waive the tort', that is, to neglect his action in tort in favour of one in *assumpsit*. Before the abolition of the forms of action in 1852, there were certain procedural advantages in so choosing. There were fewer pitfalls in drawing a

¹ *Hermann v. Charlesworth*, [1905] 2 K.B. 123; *supra*, p. 320.

² *Viz. supra*, pp. 283, 326.

³ *Valentini v. Canali* (1889), 24 Q.B.D. 166; *supra*, p. 174.

⁴ *Berg v. Sadler and Moore*, [1937] 2 K.B. 158; *Allen* (1938), 54 L.Q.R. 201; *Grodecki* (1955), 71 L.Q.R. 254; *supra*, p. 314.

⁵ *Supra*, p. 321.

⁶ *Supra*, p. 318.

⁷ *Edler v. Auerbach*, [1950] 1 K.B. 359—a most inequitable decision.

⁸ *Lord Wright* (1941), 57 L.Q.R. 341; *Fridman* (1955), 18 M.L.R. 1.

declaration on a common count for money had and received than there were, say, in the complicated declaration of trover.¹ Also the cause of action did not drop with death, and the plaintiff enjoyed the benefit of a longer period of limitation. Such legal niceties evoked the now famous lines:²

Thoughts much too deep for tears subdue the Court,
When I *assumpsit* bring, and god-like waive a tort.

These procedural advantages have now, however, disappeared.³

The torts usually the subject of this Olympian gesture were those of trover (conversion),⁴ trespass,⁵ deceit,⁶ and seduction of a servant from his contract of service.⁷ Thus in an old case, *Lamine v. Dorrell*.⁸

The defendant had usurped the right of an administrator of a dead person's estate, got certain debentures into his hands and sold them. The plaintiff, as rightful executor, brought an action in *indebitatus assumpsit* against him.

It was argued that he should have brought detinue or trover, but he was permitted to waive the tort and recover in quasi-contract. It is not, however, possible to waive every tort. Torts such as defamation or battery cannot be waived, since the defendant will not have acquired some definite profit as the result of his wrongdoing.

The phrase 'waiver of tort' is a misleading one. 'Waiver' suggests some kind of condonation, whereas nothing of the sort is involved. Although originally the procedure was based on the fiction that the plaintiff affirmed the tortious act of the defendant, it is clear that, in reality, this is not the case: Condonation of tort not implied

If I find [said Lord Atkin⁹] that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them I am not excusing him. I am protesting violently that he is a thief and because of his theft I am suing him.

¹ Winfield, *Province of the Law of Tort*, pp. 141-6.

² Adolphus, *The Circuistors* (1884), 1 L.Q.R. 233.

³ But under the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. V, c. 41), s. 1 (3), proceedings in *tort* against the estate of a deceased person must be begun within six months of taking out representation.

⁴ *Lamine v. Dorrell* (1705), 2 Lord Raym. 1216.

⁵ *Neate v. Reynolds* (1851), 6 Ex. 349.

⁶ *Refuge Assurance Co. v. Kettlewell*, [1909] A.C. 243.

⁷ *Lightly v. Clouston* (1808), 1 Taunt. 112; *Forster v. Stewart* (1814), 3 M. & S. 191.

⁸ (1705), 2 Lord Raym. 1216.

⁹ *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1, at p. 29.

The plaintiff will still have to prove that a tort was committed even if he chooses the quasi-contractual remedy; and if, indeed, he can be said to waive anything, it is not the tort, but only the right to recover damages for it. The true explanation is that waiver of a tort is merely an election of one of two alternative remedies.

This is clearly demonstrated by the leading case of *United Australia, Ltd. v. Barclays Bank, Ltd.*:¹

The plaintiffs made out a cheque which was fraudulently indorsed by one of their servants to the M.F.G. Company, of which he was a director. The defendant bank collected the cheque on behalf of the M.F.G. Company. The plaintiffs brought an action for money had and received against the M.F.G. Company, but before they obtained judgment, the company went into liquidation. The plaintiffs then brought an action against the defendant bank for conversion of the cheque.

The bank claimed that the plaintiffs, by bringing an action in quasi-contract, had waived the tort and so consented to the wrong. This contention succeeded in the Court of Appeal, but failed in the House of Lords. The choice of the quasi-contractual remedy did not mean that the plaintiffs could not resort to an action in tort, at any rate until judgment had been applied for.

(d) *Money paid by the plaintiff to the defendant under compulsion, duress, or wrongful authority*

Money paid under compulsion or wrongful authority A person who pays money to another as the result of compulsion or duress exerted by that other, or because it is extorted from him *colore officii*, can recover the money if it could not otherwise have been lawfully demanded from him.²

(i) Nature of compulsion The compulsion or duress exerted upon the payer may fall short of the commission of an actual tort against him, but nevertheless still be sufficient for him to claim that the payment was not made voluntarily. The most usual form of compulsion consists in the seizure, or threatened seizure, of the plaintiff's property by way of duress or lien.³ Thus in *Maskell v. Horner*:⁴

The plaintiff carried on business as a dealer in the vicinity of Spitalfields Market. The defendant, the owner of the market, demanded tolls from the plaintiff and threatened that, if he did not pay, he would seize

¹ [1941] A.C. 1. See Lord Wright (1941), 57 L.Q.R. 184.

² See Winfield (1944), 60 L.Q.R. 341; Marsh (1946), 62 L.Q.R. 333.

³ *Astley v. Reynolds* (1732), 2 Stra. 915; *Ashmole v. Wainwright* (1842), 2 Q.B. 837; *Valpy v. Manley* (1845), 1 C.B. 594; *Great Western Railway Co. v. Sutton* (1869), L.R. 4 H.L. 226.

⁴ [1915] 3 K.B. 106.

his goods. In fact some of the plaintiff's goods were seized, and, on consulting a solicitor, the plaintiff was advised that other traders paid the tolls and that he should do so. He therefore paid the tolls, but under protest. In a subsequent action, it was decided that the defendant had no right to claim tolls, and the plaintiff then brought an action to reclaim the money which he had paid.

The Courts of Appeal held that he could do so. He had not paid the tolls voluntarily, but under the threat of seizure of his goods:

The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.¹

It seems that some protest, at any rate, must be made by the payer in order to 'preserve his right', otherwise he will be held to have acquiesced in the payment.²

Where there are no threats or duress, the plaintiff cannot recover the money which he has paid, even though he made a protest and even though it could not lawfully have been demanded. In *Twyford v. Manchester Corporation*:³

The plaintiff, a monumental mason, was accustomed to do work on gravestones in the defendants' cemetery. The defendants charged him a small fee on each occasion. It was subsequently decided that they had no right to exact such a fee, and the plaintiff sued to recover the money which he had paid.

His action failed. There was no evidence of any threats or compulsion on the part of the defendants to make the plaintiff pay the fees, and so the payments were held to be voluntary.

An exception to the general principle exists where the duress or compulsion consists in litigation, or threatened litigation, before a competent court. To hold otherwise would be to upset compromises and to reopen issues which had already been settled: *interest reipublicae ut sit finis litium*. This is illustrated by the case of *Moore v. Vestry of Fulham*:⁴ Exception

¹ *Ibid.*, per Lord Reading C.J. at p. 118, citing Tindal C.J. in *Valpy v. Manley* (1845), 1 C.B. 594, at p. 602.

² *Brisbane v. Dacres* (1813), 5 Taunt. 143.

³ [1946] 1 Ch. 236; *William Whiteley, Ltd. v. Rex* (1909), 101 L.T. 741. See Marsh (1946), 62 L.Q.R. 633.

⁴ [1895] 1 Q.B. 399; *Marriott v. Hampton* (1797), 1 Term. R. 269; *Habberton v. Wakefield* (1814), 4 Camp. 58 (fi. fa.). But if the receipt of the money by the defendant was not *bona fide*, that is, if he was aware that his claim was invalid, the money can be reclaimed: *Ward & Co. v. Wallis*, [1900] 1 Q.B. 675.

The defendants issued a summons against the plaintiff to recover his share of expenses towards street improvement as owner of premises abutting on the highway. A summons was issued, but the plaintiff paid the money before the summons was heard and it was withdrawn. He later discovered that his premises did not abut on the highway in question and claimed to recover the money.

It was held that he could not do so. Although the threatened litigation had not yet terminated in judgment, the compulsion was still one of legal process, and recovery was barred.

- (ii) **Wrongful authority** If one person extorts money from another by use of wrongful authority and *colore officii*, the money can normally be recovered unless the payer knew that it was not due.¹ So plaintiffs who had paid money to James II's illegal Court of High Commission could reclaim it;² and a sheriff who claimed as of right, on a warrant issued by him, a sum larger than that to which he was lawfully entitled, was held bound to restore the money.³

Quantum Meruit

Quantum meruit A *quantum meruit* claim arises where work is done or services performed by one person for another in circumstances which entitle the person doing the work or performing the services to receive a reasonable remuneration therefor.

May be contractual or quasi-contractual Such a claim may arise in a number of different situations. The late Professor Winfield⁴ pointed out that some of these situations are genuinely quasi-contractual. Others, however, are really contractual, and it is often a matter of some difficulty to distinguish between them. The reason for this is that, under the old forms of pleading, it was usual to speak of a 'request' to do the work or to perform the services, and of an implied promise to pay a reasonable sum for these when done. But the term 'implied' is here ambiguous. It may mean that the Court infers a promise from the conduct of the parties, and, in theory at any rate, gives effect to what it presumes to be their common intention. If such is the meaning, then the obligation is contractual. On the other hand, it may mean that the Court imposes an obligation on the 'promisor' by virtue of a rule of law and irrespective of what the parties may be supposed to have intended. In such a case it is quasi-contractual.

¹ *Morgan v. Palmer* (1824), 2 B. & C. 729; *Steele v. Williams* (1853), 8 Ex. 625.

² *Newdigate v. Davy* (1694), 1 Lord Raym. 742.

³ *Dew v. Parsons* (1819), 2 B. & Ald. 562.

⁴ *Province of the Law of Tort*, p. 157; (1947), 63 L.Q.R. 35.

In most instances it will not be of any particular practical importance to distinguish between the two types of obligation, but in certain circumstances it may be essential to do so. If, for example, one party seeks to assert a contractual remedy such as damages, he will have to show that his right arises out of a contractual, and not a quasi-contractual, obligation.¹ On the other hand, if one of the parties suffers from some contractual incapacity, it will be of little use for the other party to prove an inferred contract, for this would be affected in exactly the same way as if the contract were express. He must show that his rights, if any, arise from quasi-contract before he can recover.²

(a) *Contractual claims*

Certain *quantum meruit* actions are contractual. An account of these has been given elsewhere in this book, and it will be sufficient to bring to mind the two main situations where such a claim may arise.

Con-
tractual
*quantum
meruit*

First, where one person has rendered a service to another in circumstances which indicate an understanding between them that it is to be paid for, although no particular remuneration has been specified, the law will infer a promise to pay *quantum meruit*, i.e. as much as the party doing the service has deserved, or, as is generally described, a 'reasonable' sum.³ The principle is precisely the same when goods are bought and sold without an express agreement as to the price, in which case the Sale of Goods Act, section 8 (2),⁴ provides that the buyer must pay a reasonable price. Under the old forms of pleading he had to pay *quantum valebant*, so much as the goods were worth.

(i) implied
agreement
to pay
reasonable
sum

Secondly, a *quantum meruit* claim may arise when the conduct of the parties to an express contract leads to the inference that they have agreed to substitute for it a new contract. In *Steven v. Bromley & Son*,⁵ for example, the tender and acceptance of a completely different type of cargo from that envisaged by the original contract was held to infer that the parties had entered into a new and substituted agreement. If no quantified remuneration can be spelt out for the new contract, then the

(ii) new
agreement
with no
price fixed

¹ *James v. Kent*, [1951] 1 K.B. 551.

² *Lawford v. Billericay R.D.C.*, [1903] 1 K.B. 772. Cf. *Sinclair v. Brougham*, [1914] A.C. 398.

³ *Hall v. Walland* (1621), Cro. Jac. 618; *Paynter v. Williams* (1833), 1 C. & M. 810; *supra*, p. 17.

⁴ 56 & 57 Vict., c. 71.

⁵ [1919] 2 K.B. 722; *Hart v. Mills* (1846), 15 M. & W. 85; *supra*, pp. 29, 82.

law will imply a promise to pay a reasonable sum. It must be remembered, however, that for such a contract to arise, each party must have had the option of accepting or rejecting the substituted agreement.¹ A new and different contract cannot be forced by one party on the other against his will.

or acceptance of partial performance The same principle is also applied where one party has, in breach of contract, only partially performed his side of the agreement, or performed it in a manner different from that contemplated by its terms.² In such a case, if the party not in default accepts the partial or substituted performance, he will have to pay *quantum meruit* the value of the benefit which he has received. So if *A* buys from *B* a certain quantity of goods, and *B* delivers less than the agreed quantity, if *A* accepts the lesser quantity, he must pay for them at the contract rate,³ or, if no rate is fixed, then he must pay a reasonable price. But again, if the party not in default has no option but to accept, then he will not be liable to a *quantum meruit* or any other action.⁴

(b) *Quasi-contractual claims*

Quasi-contract and *quantum meruit* Where the claim is quasi-contractual, the obligation is imposed on the parties by the law without reference to any existing agreement. The main situations where such a claim may arise will be noted here.

(i) contract discharged by breach First, as we have already seen,⁵ when a contract has been broken in such a way as to entitle the injured party to treat it as at an end, and he has elected to do so, he may bring an action for *quantum meruit*, for the value of the work he has done under the contract, as an alternative to bringing an action on the contract for damages. The original contract is discharged by the breach and the claim to be remunerated arises *quasi ex contractu*.

(ii) persons under a disability in receipt of necessities Secondly, we have also, in speaking of infants,⁶ and of lunatic and drunken persons,⁷ had illustrations of the rule that when necessities have been supplied to a person who by reason of disability is unable to contract to pay for them, the law will imply an obligation on such person to pay their reasonable

¹ *Forman & Co. v. Ship 'Liddesdale'*, [1900] A.C. 190; *supra*, p. 38.

² *Viz. supra*, p. 425.

³ Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 30 (1).

⁴ *Munro v. Butt* (1858), 8 E. & B. 738; *Sumpster v. Hedges*, [1898] 1 Q.B. 673; *supra*, p. 425.

⁶ *Supra*, p. 179.

⁵ *Supra*, p. 479.

⁷ *Supra*, p. 199.

value. In the case of infants, it was also pointed out that there was some doubt as to whether this obligation was quasi-contractual or contractual.¹ It would of course make no difference if the plaintiff were merely suing *quantum meruit* for necessities supplied. But if he sought to sue on an executory contract, or if, for example, the infant brought an action for breach of warranty or condition, it would be necessary to determine the true basis of the infant's liability.

Thirdly, where work is done or services rendered in pursuance of an agreement which is supposed to be, but is not, a binding contract, an obligation to pay for the work or the services rendered is imposed by the law. This class of case is exemplified by *Lawford v. Billericay R.D.C.*² where a person who had done work for a corporation under a contract which was not under seal, and therefore invalid, was able to recover a reasonable remuneration for the work which he had done. Also in *Craven-Ellis v. Canons, Ltd.*³

(iii) benefits
conferred
under
invalid
agreement

The plaintiff, together with two others, became a director of the defendant company. Under the articles of association, each of the directors was required to obtain his qualification shares within two months. If, after that time, they had not done so, they were to become incapable of acting. Neither the plaintiff nor the other directors obtained their shares. Subsequently, the company executed an agreement under seal by which it was agreed to pay the defendant a certain remuneration. The seal of the company was, however, affixed by an invalid resolution of the 'directors'. The plaintiff sought to recover the promised remuneration.

It was held that he had no claim in contract to the money, since the agreement was void. But he could sue *quantum meruit* in respect of the services which he had rendered.

Fourthly, by section 1 (3) of the Law Reform (Frustrated Contracts) Act, 1943,⁴ where a contract has been frustrated and, at the time of frustration, one party has conferred upon the other a valuable benefit, he may recover from that other such sum, not exceeding the value of the said benefit to the party obtaining it, as the Court considers just. It is suggested that this provision creates a new head of *quantum meruit* liability.

(iv) frustra-
tion

¹ *Supra*, p. 185.

² [1903] 1 K.B. 772.

³ [1936] 2 K.B. 403; *Lacey (William) (Hounslow), Ltd. v. Davis*, [1957] 1 W.L.R. 932; Cf. *Sinclair v. Brougham*, [1914] A.C. 398, and see (1939), 55 L.Q.R. 54.

⁴ 6 & 7 Geo. VI, c. 40; *supra*, p. 450.

No action where services purely voluntary. Finally we may recall the general rule that work done or services performed by one person for another creates no obligation to pay where the work or services are purely voluntary.¹ Exceptions, however, exist in the case of an agency of necessity,² bills of exchange³ and maritime salvage,⁴ but these are peculiar to those particular branches of the law.

II. BENEFITS ACQUIRED BY THE DEFENDANT OTHER THAN BY ACTION OF THE PLAINTIFF

In certain circumstances a plaintiff may bring an action for money had and received to his use even though the sums which he claims were acquired by the defendant otherwise than from the plaintiff himself. It cannot be stated, however, that this is normally possible, for it is generally maintained that there must be some 'privity' between the plaintiff and the defendant before the action will lie.⁵

Privity in Quasi-contract

Is there some need for 'privity' in quasi-contract? The meaning of 'privity' in this context is not at all clear, and the late Professor Winfield even went so far as to deny its existence altogether.⁶ It is evident that it is something distinct from, and more vague than, the doctrine of privity of contract, although attempts have been made to equate the two. It is possible that it simply means that there must be some connexion between the plaintiff and the receipt of the money by the defendant. If this is the case, then it is scarcely more than a truism. On the other hand, there seems to be some authority for a more narrow meaning, and we may perhaps try to ascertain this meaning from the two main situations in which the concept has been applied.

Situations where doctrine applied First, where *A* gives money to *B* and directs him to pay it to *C*, or where he instructs his debtor, *B*, to pay across money to *C*, *C* cannot normally bring an action against *B* for there is no privity between them. In *Williams v. Everett*,⁷ for example:

¹ *Macclesfield Cpn. v. Great Central Railway*, [1911] 2 K.B. 528; *supra*, p. 542.

² *Supra*, p. 505.

³ *Supra*, p. 507.

⁴ *Supra*, p. 506.

⁵ Halsbury, *Laws of England* (3rd ed.), vol. viii, § 411; Chitty, *Contracts* (21st ed.), p. 97.

⁶ Winfield, *Province of the Law of Tort*, p. 134; *Quasi-Contract*, p. 14.

⁷ (1811), 14 East 582; *Howell v. Batt* (1833), 2 Nev. & M. 381. But if the person receiving the money acknowledges that he holds it on behalf of the

One K., residing in South Africa, sent to his bankers in London, two bills amounting to £2,000 with instructions that they were to pay out on the bills to certain creditors who would produce letters of advice from him. Before the bills became due, the plaintiff informed the bankers that he had received a letter of advice from K. The bankers, however, refused to pay him, even though he offered them an indemnity until the bills became due. The plaintiff sued them for this default.

The plaintiff contended that the bankers had bound themselves to pay and that they had received money to his use. But the Court held that there was no privity between them, and so no action lay.

Secondly, where *A* holds money which he is contractually bound to deliver to *B*, and which *B* in his turn is bound to deliver to *C*, *C* cannot sue *A* directly for the money for there is no privity between them. Thus no action can be maintained by a lay client against the London agent of his country solicitor to recover the proceeds of a successful action undertaken on his behalf,¹ nor generally by any principal against his sub-agent.² Similarly a person who purchases a lottery ticket from another cannot recover from the organizer of the lottery the prize which the ticket has won. Although the money is held for his benefit, there is no privity between them.³

The meaning of 'privity' may now be discerned. It seems that the Courts will not allow the use of the action for money had and received in order to undermine indirectly the doctrine of privity of contract in relation to third party rights.⁴ If *A* and *B* contract together for the benefit of *C*, *C* is not entitled to claim any right to that benefit either by a contractual or quasi-contractual action. In contract, the doctrine of privity of contract supervenes; and in quasi-contract, the concept of privity provides a similar bar to recovery.

Quasi-contract cannot be used to undermine privity of contract

Situations in which Recovery is Possible

There are, however, a number of situations in which recovery is possible.

In the first place, a person who usurps the office of another, and wrongfully receives the fees pertaining to that office, is bound to account to the rightful holder for the sums so received.⁵

Recovery of money may be granted where—
(i) usurpation of office

plaintiff, that is, if he 'attorns' to his new creditor, he can be sued directly in an action for money had and received: *Shamia v. Joory*, [1958] 1 Q.B. 448; *infra*, p. 565.

¹ *Robbins v. Fennell* (1847), 11 Q.B. 248.

² *New Zealand and Australian Land Co. v. Watson* (1881), 7 Q.B.D. 374.

³ *Jones v. Carter* (1845), 8 Q.B. 134.

⁴ *Viz. supra*, p. 347.

⁵ *Rowland v. Hall* (1835), 1 Scott 539.

(ii) agent receives bribe Secondly, an agent who receives a bribe or a secret commission in relation to his agency is bound to account for it to his principal.¹ This rule also applies to situations where a person in an official position uses his position to make a profit for himself. His master can claim to recover the profit made even though it may have been made by means of a tortious or criminal act. In *Reading v. Attorney-General*:²

The appellant was a sergeant in the Army Medical Corps in Egypt. He assisted a group of criminals to smuggle illicit spirits or drugs to various destinations in and around Cairo. His task was to accompany the civilian lorries carrying the spirits, wearing his army uniform in order that they would not be searched by the police. For these services he received some £20,000 in all. When arrested by the military police, he still had some £18,000 of this money in his bank account, and this was seized by the Crown. The appellant brought a petition of right to recover the money.

The House of Lords held that money acquired by a use of his uniform which was flagrantly in breach of the duty he owed to the Crown could be retained by the Crown as money had and received to its use, and the petition accordingly failed. 'Any official position,' said Lord Porter,³ 'whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act. "You have earned", the master can say, "money by the use of your position as my servant. It is not for you, who have gained this advantage, to set up your own wrong as a defence to my claim".'

(iii) acknowledgment by holder of fund of debt Thirdly, where a person transfers to another (the transferee) a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the money to the transferee, yet the holder of the fund may, and if he does, promise to pay to the transferee, then a legal right to the money arises in the transferee, founded on the promise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder.⁴ It is not necessary for

¹ *Andrews v. Ramsay*, [1903] 2 K.B. 635; *supra*, p. 510.

² [1951] A.C. 507.

³ At p. 514.

⁴ *Griffin v. Weatherby* (1868), L.R. 3 Q.B. 753, *per* Blackburn J. at p. 758 (as adapted to comprehend the case of *Shamia v. Joory*, [1958] 1 Q.B. 448, *infra*).

the existence of a 'fund' that an identifiable sum should have been handed to the holder, provided that there is in the hands of the holder, or accruing to him, either a sum of money, or a monetary liability, over which the transferer has a right of disposal.¹ Thus in *Shamia v. Joory*:²

The defendant, an Iraqi merchant, carrying on business in this country, was indebted to the plaintiff's brother, Yousuf, in the sum of £1,300. At Yousuf's request, he agreed to pay £500 out of this money to the plaintiff, and wrote to the plaintiff notifying him of the arrangement. The £500 was never paid, and the plaintiff sued the defendant for the amount.

Barry J. held that an action for money had and received would lie. A 'fund' was constituted by the debt owed by the defendant to Yousuf, and when the defendant accepted Yousuf's direction to hand over £500 of the debt to the plaintiff, and promised to pay the plaintiff this amount, the money was to be considered as had and received to the plaintiff's use.

Finally, where a deposit or other sum of money is paid to a stakeholder to be retained by him until it is ascertained which of two persons is entitled to the money, he will be liable to an action for money had and received at the suit of the party entitled if he wrongfully parts with the money.³

(iv) Stake holders

III. JURIDICAL BASIS OF QUASI-CONTRACT

The juridical basis of the action for money had and received, and of the other quasi-contractual actions, is a topic of great interest for contemporary lawyers.⁴ There are two main views as to the basis of liability in quasi-contract. The first and more orthodox view is that it rests upon a hypothetical contract

Basis of quasi-contractual actions

¹ *Walker v. Rostron* (1842), 9 M. & W. 411; *Hamilton v. Spottiswoode* (1849), 4 Ex. 200. It can quickly be seen that, if the requirements set out above are fulfilled, including an acknowledgement to the transferee by the debtor that he holds the money on the transferee's behalf, a clear (and irrevocable?) assignment of the debt takes place *at law*, without the necessity for compliance with the formalities laid down by s. 136 of the Law of Property Act, 1925 (15 & 16 Geo. V, c. 20). No consideration is required between assignor and assignee (*Shamia v. Joory, infra.*)

² [1958] 1 Q.B. 448.

³ *Harington v. Hoggart* (1830), 1 B. & Ad. 577; *Sadler v. Smith* (1869), L.R. 5 Q.B. 40.

⁴ Lord Wright (1938), 6 Camb. L.J. 224; Seavey and Scott (1937), 53 L.Q.R. 29; Landon (1937), 53 L.Q.R. 302; Friedmann (1937), 53 L.Q.R. 451; Winfield (1937), 53 L.Q.R. 447, (1938), 54 L.Q.R. 529, (1948), 64 L.Q.R. 46; Holdsworth (1939), 55 L.Q.R. 37; Lord Denning (1949), 65 L.Q.R. 37.

which is implied by the law. According to this view, quasi-contract is but a branch of the law of contract, and subject to the same limitations. It is by no means unrestricted in scope, and a quasi-contractual obligation can only arise where a contract can be implied by law. The second and more radical view is that liability in quasi-contract is not connected with contract at all. Obligations are imposed by the law, and may be imposed whenever the Court decides that one person has been unjustly enriched at the expense of another. Most of the difficulty which has attended this subject can be traced directly to certain fictions employed in the past, and it is necessary to give some brief account of the history of quasi-contract in order to appreciate the merits of the present-day controversy.

Early Actions

The earliest example of an action which gave effect to quasi-contractual rights, although never thought of as such, is that of the action of Account.¹ It was used against three classes of persons: bailiffs, receivers, and guardians in socage, and, as its name implies, it called upon them to account for money or other goods committed to their charge. During the course of the fourteenth and fifteenth centuries the action was extended to cover persons who were outside these narrow categories, with the result that it could finally be brought by a plaintiff when money had been paid by a third party to the defendant to his use.² In his *Natura Brevium* Fitzherbert says, 'A man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver; for, if a man receive money for my use, I shall have an account against him as my receiver, or, if a man deliver money unto another to deliver over unto me, I shall have an account against him as my receiver.'³ The writ also came to be used where money had been paid under a mistake⁴ or upon an executory consideration which had wholly failed,⁵ and also where it had been extorted by fraud or duress.⁶

A certain number of cases which today would be placed under the heading of quasi-contract were covered by the action of Debt. Debt was available to recover money paid in

¹ Jackson, *The History of Quasi-Contract in English Law*, pp. 15, 32.

² Jackson, *op. cit.*, pp. 10, 30; Fifoot, *History and Sources of the Common Law (Tort and Contract)*, p. 272; Ames, *Lectures on Legal History*, p. 117.

³ N.B., 116 Q.

⁴ Jackson, *op. cit.*, p. 6.

⁵ Jackson, *op. cit.*, p. 18.

⁶ Jackson, *op. cit.*, p. 7.

pursuance of a contract which had not been performed.¹ It could also be used, provided that the claim was for a fixed sum, in circumstances similar 'to those of a quasi-contractual *quantum meruit*.² It was, moreover, the writ employed to recover money due by custom or statute, or for taxes.³ But the most important development in this sphere was the extension of the action to cover situations previously remedied by the action of Account. By the seventeenth century, if not before, it was established that both Debt and Account would lie at the suit of a plaintiff where the defendant had received money from a third party to his use.⁴ From this point Debt gradually spread until it was recognized that the two forms of action were, in many cases, concurrent remedies. As a result, Debt covered a number of situations where there was no contractual agreement between the parties but merely an obligation imposed by the law.

When in 1602, in *Slade's Case*,⁵ the old informal Court of Exchequer Chamber held that an *indebitatus assumpsit* could be brought in circumstances in which Debt was really the proper action, it is doubtful whether the judges could have realized how far the action of *assumpsit* would extend. As Holdsworth says: 'The spheres of Debt and Account had come to be almost concurrent; and therefore, when *indebitatus assumpsit* had become almost concurrent with Debt, it followed that *indebitatus assumpsit* became to be almost concurrent with Account.'⁶ Towards the end of the seventeenth century the Courts began to allow *indebitatus assumpsit* to be brought where there had been no contract of any kind—where the debt was owing because the law had created the obligation to pay it.⁷ In this development they seem to have been assisted by a pleading device in which a plaintiff who was claiming on a common count alleged both the precedent debt and a subsequent promise to pay. This subsequent promise was, of course, a pure fiction, but the Court would not allow the defendant to deny that it had been made. Nevertheless, the extension of the contractual remedy of *indebitatus assumpsit* to non-contractual situations was vehemently opposed by Sir John Holt, who was

Effect of
Slade's Case
and
indebitatus
assumpsit

¹ (1294), Y.B. 21 & 22 Edw. I, p. 598 (R.S.).

² Jackson, op. cit., p. 27.

³ Fifoot, *History and Sources of the Common Law (Tort and Contract)*, ch. x.

⁴ Fifoot, op. cit., p. 272.

⁵ (1602), 4 Co. Rep. 91a, 92b; *supra*, p. 16.

⁶ *H.E.L.* viii. 88.

⁷ Fifoot, op. cit., p. 363.

Chief Justice of Common Pleas from 1689 to 1710. But he failed to prevent its acceptance into the law, for the driving force behind it was the same as it had been in the earlier history of *assumpsit*, namely, the greater convenience of the new remedy over the existing remedies provided by the law.

The result was that *indebitatus assumpsit* could be brought in a number of heterogeneous cases many of which had been previously remedied by the actions of Debt and Account. But the fiction of the subsequent promise to pay still kept the action within a contractual framework.

Lord Mansfield

Lord
Mansfield's
rationale

This was the state of the law when Lord Mansfield, the real founder of our modern law of quasi-contract, became Chief Justice of the Court of King's Bench in 1756. There was no guiding principle to link the various cases together and the judges still decided on an empirical basis. Nevertheless it became increasingly apparent that the *rationale* of recovery was that *A* should not be unjustly enriched at the expense of *B*. As Mr. Fifoot has said:¹

The single strand running through all these decisions was the unfair advantage secured by the defendant at the plaintiff's expense. While it would be scarcely flattering to the discernment of the judges to suppose them unconscious of its existence, it is equally true that it was not avowed as an *a priori* concept of English jurisprudence. But the precedents were so numerous and the current of opinion so steady that it wanted but the advent of a dominant personality to proclaim the principle of unjust enrichment as a single and all sufficient *ratio decidendi*. To the generous mind of Lord Mansfield the invitation was irresistible. . . .

In 1760, in his great judgment in *Moses v. Macferlan*,² Lord Mansfield explained the juridical basis of the action for money had and received:

This kind of equitable action,³ to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious

¹ Fifoot, *op. cit.*, p. 366.

² (1750), 2 Burr. 1005, at p. 1012.

³ Lord Mansfield was not implying that the action is 'equitable' in the technical sense of the word.

contract, or, for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

The facts of the case were as follows:

Moses received from Jacob four promissory notes of 30s. each. He indorsed these to Macferlan who, by a written agreement, contracted that he would not hold Moses liable on the indorsement. Subsequently, however, Macferlan sued Moses on the notes in a Court of Conscience. The Court refused to recognise the agreement, and Moses was forced to pay. Moses then brought an action against Macferlan in the King's Bench for money had and received to his use.

Lord Mansfield allowed him to recover the money. It seems that he conceived of *indebitatus assumpsit* as something distinct from contract, and possibly distinct from any implied or notional promise to pay. Commenting on this decision, Lord Wright has pointed out:¹

Mansfield does not say that the law imports a promise. The law implies a debt or obligation, which is a different thing. In fact he denies that there is a contract; the obligation is a creation of the law, just as much as an obligation in tort.

This obligation arose from 'the ties of natural justice' which would compel the defendant to repay money belonging *ex aequo et bono* to the plaintiff.

Sinclair v. Brougham

Lord Mansfield's *rationale* held sway for a considerable time. In the nineteenth century, however, the substantial abolition of the forms of action by the Common Law Procedure Act, 1852, gave a new lease of life to the almost defunct idea that quasi-contract was based on a contract implied by law. It might have been thought that, after the passing of this Act, no further reason existed for retaining the fiction of the implied promise to pay. But, paradoxically, this was not the case. Instead of the

Rejection
of Lord
Mansfield's
theories

¹ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32, at p. 64.

old forms of action, lawyers began to think of obligations in terms of tort and contract, and, since quasi-contractual claims were clearly not tortious, they had to be contractual. The spirit of the nineteenth century was, moreover, opposed to such idealistic formulations as '*aequum et bonum*' and 'natural justice', and the judges sought a more legalistic basis for their decisions.

Sinclair v. Brougham This movement reached its climax in 1914, in the case of *Sinclair v. Brougham*, where Lord Haldane said:¹

So far as proceedings *in personam* are concerned, the common law of England really recognizes (unlike the Roman Law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law.

In that case:

A building society, in addition to its ordinary business, had engaged in a banking business which was outside its legal powers. It had accepted large sums of money from depositors on contracts of borrowing which were accordingly *ultra vires* and void. The society was being wound up, and after the outside creditors had been paid the remaining assets were insufficient to pay both the shareholders and the depositors in full. Each of these classes claimed priority over the other. The depositors rested their claim to repayment on the ground *inter alia* that the deposits were recoverable as money had and received to their use.

The House of Lords held that the claim, so far as it rested on this ground, must fail. The action for money had and received was based on an imputed or notional promise to repay, and the law could not *de jure* impute promises to repay, which, if made *de facto*, it would inexorably avoid.

An *ultra vires* borrowing [said Lord Parker²] by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make.

¹ [1914] A.C. 398, at p. 415.

² At p. 440; see also Lord Sumner at p. 452. The vigorous dissenting judgment of Lord Dunedin, a Scottish Lord of Appeal, is also worth careful study.

In its final decision, however, the House granted the depositors some redress. The mixed mass of assets in the hands of the liquidator represented in part moneys of the shareholders which the directors of the society had wrongfully employed in the banking business, and in part money which the depositors had provided. As it was impossible to say what amount belonged to each of these classes, both of them were entitled to follow their property into the assets by means of a 'tracing order' in equity. The effect of this would be that the liquidator would divide the assets *pari passu* between them in proportion to the amounts credited to each class in the books of the society.

The Present-day Position

It has frequently been asserted that *Sinclair v. Brougham* has put an end to all legitimate speculation on the juridical basis of quasi-contract, and that the question has been settled once and for all by the House of Lords. In a later case, however, Lord Wright¹ argued that the observations in favour of the implied contract theory formed no part of the *ratio decidendi* of that case. The action for money had and received, he said, lies only for the recovery of a 'debt', and it was settled law that no debt was owing by the society to the depositors, because the contract which purported to make one was a nullity. The issue before the House therefore did not turn upon the question whether the basis of the action for money had and received is or is not an implied contract. But this reasoning is unconvincing. The substantial question in the case was whether the law would imply such a debt even though the contract was *ultra vires* and void.

What is position at present?

Nevertheless, there is no reason to suppose that *Sinclair v. Brougham* decided anything more than that an action for money had and received will not lie to recover money lent to a company on an *ultra vires* contract of borrowing. The action is not unlimited in scope, and this is one of the limitations. There is no necessity to formulate a wider *ratio decidendi* which would embody the implied contract theory and inhibit the Courts from imposing a quasi-contractual obligation whenever a contract in the same circumstances would be barred. Indeed, such a proposition would scarcely be tenable in the light of the obligations which are imposed by the law upon infants, lunatics, and drunken persons to pay for necessities supplied

¹ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32, at p. 64.

to them during the period of their incapacity.¹ The better view is, then, that the question is still an open one, and that Lord Mansfield's *rationale* may still legitimately be advanced to explain the basis of quasi-contractual claims.

With this in mind, we may perhaps consider the arguments on both sides.

Arguments
in favour
of implied
contract

The arguments in favour of the implied contract theory are mainly historical. First, it is said, all quasi-contractual actions are but species of the genus *assumpsit*, and long have rested upon a notional or imputed promise to pay. This classification is not merely procedural, but substantive. The abolition of the forms of action did no more than to absolve the plaintiff from the necessity of setting out the particular form of action on which he relied. It did not affect the substantive law in any way, nor did it bring into being new causes of action which did not exist before. Secondly, Lord Mansfield's doctrine is too vague and indeterminate to be a useful guide to decision. Those legal systems which base recovery upon a doctrine of unjust enrichment still find it necessary to impose limitations on claims to restitution, and in English law these limitations are imposed by the test of the implied contract. Thirdly, the weight of judicial authority from *Slade's Case* right down to the present day has been strongly in favour of the implied contract theory.²

Arguments
for 'unjust
enrich-
ment'

The supporters of unjust enrichment meet these arguments in the following ways. First, they say, the fiction of the implied contract was introduced purely as a procedural convenience. It was a technical pleading device, the necessity for which has now disappeared. There is no reason why the law should be unnecessarily hampered and constricted by outworn procedural limitations:

These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains, the proper course for the judge is to pass through them untrammelled.³

¹ *Supra*, p. 560. Also see *Lawford v. Billericay R.D.C.*, [1903] 1 K.B. 772 and *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403; *supra*, p. 561.

² In addition to Lords Haldane, Porter, and Sumner in *Sinclair v. Brougham*, there are Hamilton L.J. and Cozens-Hardy M.R. in *Baylis v. Bishop of London*, [1913] 1 Ch. 127, at pp. 133, 137; Scrutton L.J. in *Holt v. Markham*, [1923] 1 K.B. 504, at p. 513; and Wynn-Parry J. in *Re Diplock*, [1947] Ch. 716.

³ *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1947] A.C. 1, per Lord Atkin at p. 27.

Secondly, the view that the notional contract is the basis of modern quasi-contract only pushes the difficulty one stage back. For we then have to ask, When will the law imply such a contract? And the only possible answer to that question is to say that it will do so when it is just and reasonable that it should do so. Thus the implied contract is not a true alternative basis to that which Lord Mansfield put forward; it is a test superimposed on his, in deference to supposed historical necessity and without any logical justification. Moreover, no protagonist of unjust enrichment would assert that restitution should be made in all cases where one man has unjustly benefited at another's expense, and there is no reason to suppose that Lord Mansfield intended to lay down any such sweeping principle. Due regard must be had to the precedents, and to any other limitations which may already be in existence or which may in future appear.¹ Thirdly, although it is true that judicial authority has generally been in favour of the implied contract, there have been some powerful voices raised against it. Lord Atkin,² Lord Wright,³ and Lord Denning⁴ have all ranged themselves against this theory, and it has not been accepted by the majority of academic opinion which is in favour of unjust enrichment.

From a practical point of view, it cannot be said that the Conclusion adoption of one or other of these theories will make a great deal of difference in any specific case. In no event, for example, would it be possible for a quasi-contractual action to be brought by a depositor to recover money lent to a corporation under an *ultra vires* banking contract, or by a person who had lent money to an infant to recover his loan. Nevertheless the doctrine of unjust enrichment is still to be preferred, for it would enable the Courts to establish more clearly the aims of the law of quasi-contract, and to combine the existing common law remedies with others in equity in order to present a more comprehensive general theory of Restitution. In the United States this development has already taken place, and there are signs of its appearance in this country.

¹ See Gutteridge (1934), 5 Camb. L.J. 223.

² *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1947] A.C. 1, at p. 27.

³ (1938), 6 Camb. L.J. 305; *Brook's Wharf v. Goodman Brothers*, [1937] 1 K.B. 534, at p. 545; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32, at p. 61.

⁴ (1949), 65 L.Q.R. 37; *Nelson v. Larholt*, [1948] 1 K.B. 339, at p. 343.

*Restitution*¹

Principle of
Restitution

The principle of Restitution is that a person who has been unjustly enriched at the expense of another is required to make restitution to that other. At first sight, it may seem that this is merely a restatement of Lord Mansfield's *rationale* of the action for money had and received. But it is, in fact, a great deal more than this, for it also comprehends remedies which lie quite outside the quasi-contractual actions already discussed.

Includes
actions at
common
law

At common law, it includes the tortious action of conversion and also a proprietary remedy by which 'an owner can follow his property into the hands of any person into which it may come.'² Provided that the property, or what represents it, is identifiable and has not been mixed with other property, it can be recovered. Thus where a servant or agent absconds with property belonging to his principal, the principal can claim the property or the proceeds of its sale,³ or trace it into a bank account,⁴ so long as there is no admixture of other money.

and in
equity

In equity, the principle of Restitution includes both a personal action similar to, but not identical with, the action for money had and received,⁵ and also the proprietary remedy of 'tracing'.⁶ For these to arise, there must be initially in existence a trust or some other fiduciary relationship. But the proprietary remedy is superior to its common law counterpart in that the 'beneficiary' can trace into a mixed fund and becomes entitled to a charge over the assets.

but still
heterodox
theory

It cannot be said that Restitution has been accepted as part of the law of England, but it has received the judicial approval of Denning J. (as he then was) in *Nelson v. Larholt*:⁷

The principle [he says] has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with an express trust, or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer

¹ See Seavey and Scott (1937), 53 L.Q.R. 29; Winfield (1937), 53 L.Q.R. 447; Lord Denning (1949), 65 L.Q.R. 37 *American Restatement of Law of Restitution*.

² See Snell's *Principles of Equity* (24th ed.), p. 229.

³ *Taylor v. Plumer* (1815), 3 M. & S. 562.

⁴ *Banque Belge v. Hambrouck*, [1921] 1 K.B. 321.

⁵ *Re Diplock*, [1948] Ch. 465; *Ministry of Health v. Simpson*, [1951] A.C. 251. See Snell's *Principles of Equity* (24th ed.), p. 229.

⁶ *Sinclair v. Brougham*, [1914] A.C. 398; *Re Diplock*, *supra*.

⁷ [1948] 1 K.B. 339, at p. 343.

appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires.

This radical statement may prove to be the basis of future development in the sphere of quasi-contract, but for the present it is necessary to temper optimism with caution.

APPENDICES

APPENDIX A

FORM OF CHARTER-PARTY¹

..... 19 ..
It is this day mutually agreed between
 Owners of the good Steamship called the of . . . tons gross register
 . . . tons deadweight exclusive of bunkers, or thereabouts, now
 and expected ready to load on or about
 and Charterers of

1. That the said Vessel shall with all convenient speed proceed to Loading
 (or so near thereunto as she may safely get and safely lie, always afloat),² and port
 there load at a usual safe berth as customary a full and complete cargo of Cargo
 which the said charterers bind themselves to ship, not
 exceeding what the Vessel can reasonably stow and carry over and above fuel for
 bunkers and Vessel's use, her tackle, apparel, provisions, and furniture.

Being so loaded the Vessel shall proceed with all convenient speed to Destina-
 (or so near thereunto as she may safely get and safely lie, always afloat), and there tion
 to deliver the cargo at a usual safe berth as customary on being paid freight in Freight
 cash, British Sterling, at the rate of per ton of 20 cwt. intaken/
 delivered weight, in full of all port charges, pilotages, and harbour dues on the
 Vessel, the Charterers paying all dues and duties on the cargo.

The freight shall be paid at by

2. Should the Vessel not be ready to load by the Charterers shall Cancelling
 have the option of cancelling this charter. date

3. The Cargo shall be loaded in days and discharged in Rate of
 days. Any time lost during usual working hours at the port owing to bad weather loading,
 shall not be counted. discharg-
 ing, etc.

[ss. 4-8 relate to loading, Cargo, strikes, &c.]

9. If the Vessel is detained longer than the time allowed for loading and/or Demurrage
 discharging, demurrage³ shall be paid at per day.

[ss. 10 and 11 relate to payment and clearances.]

12. The Shipowners in all matters arising under or affecting this contract Exceptions,
 (including matters before loading or after discharge) shall be entitled to the like etc.
 privileges and rights and immunities as are contained in sections 2 and 5 of the
 Carriage of Goods by Sea Act, 1924,⁴ and in Article IV of the Schedule thereto
 as being agreed terms of this contract. This charter-party shall be deemed to be a
 contract for the carriage of goods by sea to which the said sections and the said
 Article apply.

13. The Vessel shall have liberty to sail without pilots, to call at any port or Liberties
 ports in any order for fuel, supplies or any purpose whatsoever, to tow or be towed,
 to assist vessels in distress, to make trial trips after notice, and adjust compasses,
 all as part of the contract voyage. Salvage shall be for the Shipowner's benefit.

14. The Vessel shall have liberty to comply with any orders or directions as to War
 departure, arrival, routes, ports of call, stoppages destination or otherwise howso-
 ever given by the Government of the nation under whose flag the Vessel sails or
 any department thereof, or any person acting or purporting to act with the
 authority of such Government or of any department thereof, or by any Commit-
 tee or person having, under the terms of the War Risks' Insurance on the Vessel,

the right to give such orders or directions, and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation.

Lien 15. The Shipowners shall have a lien upon the cargo for all freight, dead freight, demurrage, average, and all other charges whatsoever.

Average 16. General Average⁵ (if any) shall be settled according to the York-Antwerp Rules, 1950.

Brokerage 17. per cent. Brokerage upon the gross amount of freight is due by the Shipowners to after shipment of Cargo.⁶

¹ The above is a 'voyage' charter-party, i.e. made for a specified voyage. Another form of charter-party is the 'time' charter-party, for a definite period.

² For the meaning of the words 'always afloat', see *Palgrave, Brown & Son, Ltd. v. S.S. Turid*, [1922] A.C. 397, *supra*, p. 136.

³ It is usual to fix a certain number of days, called 'lay days', for the loading and unloading of the ship. Beyond these the merchant may be allowed to detain the ship, if need be, on payment of a fixed sum *per diem*, such additional days being in fact lay days that have to be paid for: *Wilson v. Thoresen*, [1910] 2 K.B. 405. Both the detention and the payment are called *Demurrage*. 'Demurrage' is really agreed or liquidated damages for each day's detention. If no rate of demurrage is agreed, the shipowner has a claim for unliquidated damages (called 'damages for detention'), i.e. what he can prove he has in fact lost by the delay: *Invership S.S. Co. v. Bunge*, [1917] 2 K.B. 193.

⁴ 14 & 15 Geo. V, c. 22. Article IV contains the 'agreed' exemption clauses.

⁵ *General average* means the apportionment of the loss among all the parties interested in ship or cargo in proportion to their interest where the loss is caused intentionally and for the common safety, as by cutting away masts or throwing cargo overboard.

⁶ See *Les Affréteurs Réunis Société Anonyme v. Walford, Ltd.*, [1919] A.C. 801; *supra*, p. 351.

APPENDIX B

FORM OF SIMPLE BILL OF LADING

(See page 388)

Shipped at in apparent good order and condition by
..... of in
and upon the good Steamship called the whereof
..... is Master for this present voyage and bound for
..... (*with liberty to sail without Pilots, to call
at any ports in any order for bunkering or other purposes, or to make trial trips after
notice, or adjust compasses, all as part of the contract voyage*)
a cargo of of
tons weight/weight shipped unknown, which is to be delivered in the like good
order and condition at the said Port of unto
or . . . Assigns he or they paying Freight for the same as per Charter-Party dated
..... 19 .., all the terms, conditions and exceptions contained in which
Charter-Party are herewith incorporated.

General Average payable according to York-Antwerp Rules, 1950.

All the terms, provisions and conditions of the Carriage of Goods by Sea Act,
1924, and the Schedule thereto, are to apply to the Contract contained in this Bill
of Lading, and the Owners and the Charterers are to be entitled to the benefit of
all privileges rights and immunities contained in such Act, and the Schedule
thereto, as if the same were herein specifically set out, the unit under article IV
(5) being the ton. If, or to the extent that any term of this Bill of Lading is re-
pugnant to or inconsistent with anything in such Act or Schedule it shall be void.
In witness whereof the Master or Agent of the said Vessel hath signed
..... Bills of Lading, all of this tenor and date, drawn as a set consecutively
numbered, any one of which being accomplished the others shall be void.

.....19..

APPENDIX C

FORM OF BILL OF EXCHANGE

(See page 381)



...London, 18th June.....1958

EXCHANGE FOR.....U.S. \$65.00.....

At.....60 days sight.....pay this .. first..... Bill of Exchange

.....(second unpaid)..... to the Order of

..... Ourselves

..... Sixty-five United States Dollars

.....Payable at the current rate of exchange for sight drafts on

New York.....

Valuereceived..... which place to Account.

To.....A.N.C. & Cia.....

Per Pro.

.....Valparaiso.....

C.D.E. Ltd.

.....Chile

J. Long

Secretary

EXPLANATION

This Bill of Exchange for \$65.00 was drawn in London on the 18th of June 1958, by J. Long on behalf of C.D.E. Ltd. It is drawn upon (i.e. addressed to) the firm of A.N.C. & Cia. in Valparaiso in favour of the drawers, C.D.E. Ltd. It is expected that A.N.C. & Cia. (the drawees) will accept the bill by writing their name across its face.

The bill is a 'usance' bill, that is to say, it has been drawn so that it is to become payable at some date after acceptance. The words 'at 60 days sight' mean that it becomes due 60 days after the drawees have accepted it.

We shall suppose that C.D.E. Ltd. are exporting goods to Chile, to A.N.C. & Cia. It has been arranged that the documents of title to the goods shall be delivered to the Chilean firm upon the acceptance by them of this bill. Sixty days after acceptance, C.D.E. Ltd. (or any subsequent indorsee of the bill) will be entitled to claim payment from A.N.C. & Cia.

Alternatively, the bill could have been drawn 'at sight' or 'on demand' in which case it would be payable immediately, and the documents would not be handed to the Chilean firm except against payment of the bill.

APPENDIX D
FORM OF PROMISSORY NOTE

(See page 382)



£100

London, 1st January 1959

On Demand, I promise to pay to Mr. P. Smith or Order
One Hundred Pounds, with interest at five per cent per
annum until payment, for value received.

John Brown

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